



DIGEST ON HUMAN RIGHTS AND ACCESS TO JUSTICE

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FOREWORD

Access to justice and human rights have had a blotted and grim history in East Africa. Perhaps, this is to be partly attributed to the policies, laws, culture, and institutions that were bequeathed to the individual countries upon attainment of independence. Human rights as defined in the Universal Declaration of Human Rights and in subsequent international treaties, had little place in the colonial regime established in the East African countries. The colonial regimes created prolific corruptive forces that were at best hostile to human rights. At the brink of independence of each of these countries, it was expected that human rights protection and promotion would take a center stage in the new independent governments. But this was not to be. The new governments embarked on perfecting that which the colonial governments had started.

Thus, in Kenya for instance, though the Constitution embodied a bill of rights, the rights were merely paper rights. Until 2001, the courts declined to exercise jurisdiction over human rights cases on the ground that since there were no rules of procedure enacted by the Chief Justice as envisaged by section 84(6) of the Constitution, the bills of rights lacked a framework for enforcement. In Tanzania, it was not until 1985, twenty-three years after attaining independence, that a bill of rights was enshrined in the Constitution. In Uganda, like in Kenya, the existence of a bill of rights, has not fully guaranteed the respect for human rights and its enforcement. The picture that is hence drawn is that litigating the bill of rights in East Africa has been beset with problems inbuilt within the socio-political and the legal systems.

It is in this context, that there is a dearth of human rights jurisprudence in East Africa. In the recent past, however, there have been great strides achieved in consolidating gains in the human rights arena though documentation of the same have not been systematic and exclusive. Accordingly, the Human Rights Law Digest could not have come at a better time. This is the first time that a digest on human rights cases in East Africa is compiled and published. The Digest attests to the commitment of the East Africa Law Society (EALS) to the protection and promotion of human rights in the region. Indeed, as the premier regional bar association in East Africa, the EALS considers the questions of human rights, rule of law and good governance as central to its vision and mission.

The Digest documents judicial landmarks in the field of human rights in East Africa. It highlights fundamental issues surrounding the enforcement of

human rights in the region. The issues range from anticipatory bail to freedom of movement; from legal representation to the right of a wife not to be ordered to return to her ex-husband.

The Digest thus forms the foundation upon which the systematic and consistent documentation of human rights cases in East Africa will be built. Consequently, this generation, unlike the colonial regime, will be able to bequeath to the next generation not a culture of “human wrongs” but one of respect for “human rights.” Only then can we confidently say that the region has moved from “human wrongs to human rights”.

I therefore have no doubt that this Digest is of great importance to legal practitioners, the judiciary, human rights activists, scholars and human rights students. In addition, the Digest will be found to be a treasure to behold when the East African Court of Justice fully embraces its mandate and jurisdiction as a human rights court.

It is also vital to note that in the future editions of the Digest, the EALS plans to include human rights cases from Rwanda and Burundi. Further, it is also expected that the future editions of the Digest will be both in English and French. In the final analysis, it is the hope of the EALS that the ‘Human Rights Law Digest’ will grow to be the premier human rights reference text in East and Central Africa.

Done at Arusha this 15 April 2007.

TOM O OJIENDA
PRESIDENT; EAST AFRICA LAW SOCIETY

INTRODUCTION

As a member of both the Law Society of Kenya and the East African Law Society, I feel honoured to write this brief introduction to this Digest on human rights law cases. I wish to point out right away that this Digest does not purport to be a comprehensive collection of human rights law cases. It is a highlight of few decisions in that field of law for quick reference. Perhaps there is no other area of law that involves greater emotion and caution on the part of the litigants and the bench as much as cases involving abuse or alleged abuse of human rights. The emotion on the part of the litigants is brought about by acts of the transgressors which deny the litigant the fundamental right to enjoy a 'basic human existence'. On the other hand, the transgressor, invariably being an agent of the government, the courts are sometimes anxious to strike a balance so as not to upset the 'powers that be'. This assertion may not find a ready authority to back it up. But it is common knowledge that courts have not been aggressive in upholding human rights until recently when democratic space gradually opened up in East Africa.

Human rights, sometimes called fundamental rights and freedoms, are inherent and not conferred upon by law or the state. Nonetheless, human rights are incorporated in the Constitutions of Kenya, Uganda and Tanzania in a part commonly called the Bill of Rights. The setting out of these rights is intended to avoid doubt and make them known to all who may care to find out. Unlike other laws (for example, statute law or common law) human rights have found a place in the Constitutions, so that they form part of basic law or what is sometimes referred to as the grand norm a means to protect and preserve the fundamentals of human existence.

Litigation regarding constitutional issues in the three East African countries began soon after independence in each of the countries respectively. Matters concerning the Constitution and many more specifically fundamental rights have been the preserve of the High Court except, of course, on appeal as will be noted from the decisions reported in this book.

Among the first constitutional cases to be determined in Uganda by the Court of Appeal was *Ibingira and others v Uganda* in 1966, when the court held that section 28 of the Uganda Constitution guaranteed the right to personal liberty and freedom of movement. This case concerned the Deportation Ordinance under which the appellants had been held pending a decision by the minister as to whether or not an order to deport the appellants should be

made. In 1968 the Court of Appeal again in *Ochieng v Uganda* upheld the rights to personal liberty and stated that it was wrong for a witness to be taken into custody pending investigation into crime.

The question of personal liberty in Uganda was again revisited in *Okiring and others v Attorney General* [2005] by the High Court of Uganda when it said that under article 23(b) of the Constitution, it was a violation of right to liberty to hold in custody that person for more than 120 days by General Court Martial. By the time these decisions were made Uganda had in place a new Constitution which replaced the independence one.

It appears from the authorities available and the cases reported in the Digest, that there has not been much litigation involving fundamental rights in Uganda. The situation is similar in Tanzania with only a handful of human rights cases decided since independence. There does not seem to be significant diversity in the subject dealt with in courts. Most cases involve the question of movement or personal liberty. This trend is especially noticeable in the Uganda decisions.

Only Tanzania appears to have had some important decisions made on property rights. In *Ami v Safari*, the appellant claimed land which had been confiscated from his father in 1974 during the villagization exercise. The court held that article 22(4) of the Constitution of Tanzania could not apply to aid the appellant because it was enacted after 1974. The court ruled that the section of the Constitution could not apply retrospectively. The Tanzanian case of *Kehegu v Tarayani* is particularly important. The High Court, in allowing the appeal, asserted that only a court of law could try, convict and sentence offenders. The appeal arose out of a claim over private property. It would be correct to state here that this position holds correct in the two other East African countries and indeed, the whole of the Commonwealth.

Interestingly, no cases seem to have been available for reporting in this Digest with regard to protection of private property in Kenya and Uganda.

Of the three East African countries Kenya appears to have witnessed the greatest number of cases touching on other areas including freedom of religion and conscience (*Patel v Premji*). The right to a fair trial and freedom from discrimination (*Madhwa and others v City Council of Nairobi* and *Ng'ang'a v Republic*) and freedom from limitation of enjoyment of fundamental rights and freedoms (*Republic v Hussein*) (it is not suggested that this is a new genre of a human rights). The courts in Kenya have also considered the power of the court to grant remedy in anticipation of violation of fundamental rights, for example, by giving bail in anticipation of unlawful arrest. (See: *W`Njuguna v Republic*).

Githunguri v Republic is a case that has dominated the constitutional law landscape since 1985. The High Court demonstrated unusual courage at a time when the country was a single party state and courts had a tendency to decide favourably to the government, particularly in ‘politically sensitive’ cases. In this case, the High Court held that it had an inherent power to ensure fair treatment of all citizens. It was stated that the Attorney General may lose his power to prosecute under section 26 of the Constitution where he had assured an accused person that he would not charge him and such accused then lost or destroyed his evidence on the strength of such assurance.

Interestingly, and perhaps on political considerations, the court in *Githunguri* case failed to make a decisive order to terminate the criminal case pending before the chief magistrate’s court and instead ‘hoped’ that, in the light of the High Court’s findings, the Attorney General would terminate the proceedings.

An important point of law was settled in *Kuria and others v Attorney General* where the High Court held that to pursue both criminal and civil remedies simultaneously against a person could not be said to cause double jeopardy to the accused person or the defendant.

In Kenya, possibly with the exception of *Githuguri v Republic* courts have exhibited greater decisiveness in dealing with human rights cases after the introduction of the multi-party democracy in 1992. The dearth of human rights cases of material importance in Uganda may be attributed to the long political instability experienced in that country. It is not clear why Tanzania has not been robust in producing cases related to human rights.

It is hoped that the people of East Africa will become more vigilant and engage the courts in safeguarding their fundamental rights and freedoms.

MUTUMA D KIBANGA
ADVOCATE

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AMI V SAFARI AND OTHERS

NO. 5 OF 1998; [2001] 1 EA 3

[1] *Constitutional Law – Protection and promotion of basic human rights – Right to compensation upon confiscation of property – Whether the Constitution could be applied retrospectively.*

Editor's Summary

The appellant's late father owned a 25-acre parcel of land and in 1974, 20 acres of the land was taken away in the villagization exercise and allocated to the families of the respondents.

The appellant commenced action at the primary courts for recovery of the land on the grounds *inter alia* that the act of confiscation of the property was unconstitutional.

The issue for determination was whether the constitutional provisions on protection of basic human rights could apply to the appellant's case in view of the fact that the provisions were enacted way after the villagization exercise.

Held – Provisions of basic Human Rights section are not retrospective and so article 22(4) of the Tanzania Constitution cannot be relied upon to determine the validity of the confiscation of property that took place in 1974.

Case referred to in judgment

(“A” means adopted; “AL” means allowed; “AP” means applied; “APP” means approved; “C” means considered; “D” means distinguished; “DA” means disapproved; “DT” means doubted; “E” means explained; “F” means followed; “O” means overruled)

AG v Akonaay [1995] TLR 80

Judgment

LUGAKINGIRA JA: The appellant's late father, one Tsekeway Ami, was the owner of a 25-acre parcel of land at Mamire village in Bahati District. In 1974 twenty acres of this land were taken away in the villagization exercise and allocated to the families of the four respondents, each family being assigned five acres. The appellant's father died in 1987.

In 1991 the appellant commenced action against the respondents in the primary court to recover the twenty acres. The basis of his claim began to unfold when he was being cross-examined by the first respondent (then fourth

defendant), Dominick Safari. The appellant stated that the villagization exercise was oppressive and violated basic human rights guaranteed in the Constitution which became justifiable in 1988. The action was partially successful. The primary court took away two and a half acres from each of the respondents, a total of ten acres, and restored them to the appellant. In doing so, the court steered clear of the constitutional aspect, making no reference to it, but purported to base its decision on limitation. Taking into account that suits to recover land must be commenced within twelve years, and accepting the appellant's claim that his father had previously protested against the seizure of his land, the court held that the time began to run from 1987 when the appellant's father died. The action was therefore adjudged in time, it having been commenced four years later.

This decision did not satisfy the appellant who appealed to the District Court seeking to recover the remaining ten acres. The appeal was unsuccessful. Although the District Court held that time began to run from 1974 and, therefore, the suit was time barred, it decided not to disturb the decision of the primary court giving two reasons. First, the appellant was adjudged entitled to compensation for the land taken away by virtue of the provisions of article 24(2) of the Constitution, and the ten acres restored to him was considered sufficient 'compensation'; second, because the respondents never participated in the appeal, either in person or by written statements, although they were duly served.

The appellant was still dissatisfied and further appealed to the High Court. In his petition of appeal he conceded the District Court holding that time began to run from 1974. However, both in the petition and in his subsequent submissions he came up with a story of his father's incapacitation through illness from 1980 to 1987. And believing that the Law of Limitation Act, 1971 was applicable, he accordingly invoked the benefit of section 16 thereof. The section reads in part:

“Where, after the right of action for a suit has accrued and before the period of limitation prescribed for such suit expires, the person to whom such right has accrued suffers a disability, in computing the period of limitation prescribed for such suit, the time during which such person is under disability shall be excluded.”

The High Court (Munuo J) accepted the appellant's story, readily invoked section 16, and held that the 12 year period expired in 1991 after excluding the period 1981-1987. The suit was therefore adjudged to have been in time. However, the court dismissed the appeal, the learned judge holding that the respondents had possessed the land for seventeen uninterrupted years and that the appellant had acquiesced in the possession by not suing for its recovery. This outcome surprised the appellant who immediately lodged a notice of appeal.

While granting leave to appeal, the High Court certified the following point:

“Whether the learned judge having found that the suit was not time barred because the period of 7 years was excluded under section 16 of the Law of Limitation Act, 1971 she could have proceeded to hold that the respondents possessed the disputed land "under the concept of acquiescence" for 17 years.”

The appellant adopted this point which pervades his two-ground memorandum of appeal. He also appeared in person at the hearing as did the first respondent only. He submitted that the learned judge having found that the suit was not time barred; she erred in holding that he had acquiesced in the respondents' possession of the suit land for seventeen years. He repeated the story before the High Court that his father was bedridden for seven years. Although the constitutionality of the seizure of the land did not feature in the grounds of appeal, he further charged that it was unlawful to take away the land without compensation, citing for this article 24(2) of the Constitution and this Court's decision in *AG v Akonaay* [1995] TLR 80. The first respondent replied briefly that no evidence had ever been adduced about the appellant's father's alleged illness. He was saying, in other words, that assuming section 16 was applicable, it was not properly invoked in the circumstances of this case. He then underscored the aspect of acquiescence pointing out, as he had done at the trial, that he had in fact inherited his part of the suit land from his father who was the allottee in 1974.

We are unable to see the merits of this appeal even though we are equally unhappy about the appellant's partial victory. As regards the grounds of appeal, we are in agreement with the appellant's criticism of the High Court's decision. It was contradictory to say that the suit was in time but in the same breath to hold that the appellant had slept on his rights by acquiescence for seventeen years. It seems the learned judge had suddenly forgotten her own decision to exclude seven of the seventeen years. Whether it was in fact correct to invoke section 16 and exclude the seven years is another matter to be looked at shortly. But since in her opinion the suit was instituted in time, that is, within twelve years, could not be acquiescence for seventeen years at the same time. The two aspects just cannot go together. Questions of acquiescence, adverse possession and the like would arise only where the period of limitation has expired.

The crucial question is whether the learned judge was correct in law to invoke section 16 and to go on and exclude the seven years. With respect, we think not, for various reasons. First of all, invocation of section 16 was misdirection on the law. A reading of section 50 of the Limitation Act makes it clear that the whole of the Act, except section 43, does not apply to proceedings under customary law, but it is replaced by the Customary Law

(Limitation of Proceedings) Rules, 1963, GN number 311 of 1964. Section 16 of the Act therefore has no application in proceedings like the instant proceeding. On the other hand, the rules aforesaid do not provide for exclusion of time as such but for extension of periods of limitation where they have expired. That is the essence of rule 3. For example under sub rule (1) of rule 3, where a person is under 18 years of age or insane when the right to sue first accrues, the period of limitation would be calculated as though the date when the right to sue accrued was the date when he attained 18 years or recovered his sanity. Moreover, sub rule (4) empowers the court to admit any proceeding after the expiration of the period of limitation if it is satisfied that the person bringing the proceeding was unable for sufficient cause to bring the proceeding earlier. If in the instant case there was evidence of the appellant's father's illness as claimed, the appellant's case would have fallen for consideration in the context of this sub rule. This takes us to the second reason for holding that the exclusion of the seven years was improperly made.

As already stated, the learned judge made the exclusion after accepting the appellant's story about his father's illness. But that was a story and not evidence. As correctly submitted by the first respondent, the appellant never adduced evidence of the illness at the trial but made mention of it for the first time in the petition of appeal and submissions before the High Court. A petition of appeal and supporting submissions are not evidence and it is surprising that the learned judge had a different impression. We hold in the premises that it was an error to accept the appellant's story as evidence in the same way as it was an error to invoke section 16 of the Limitation Act. We would go further and say, if it is necessary to do so, that even the alleged protestations by the appellant's father testified to at the trial counted for nothing. First of all, that evidence could only have been hearsay. By the appellant's own account he never saw his father from the time he was aged one year till 1987 when he was about 37 years of age and when his father was allegedly already bedridden. The appellant was therefore not in a position to have had personal knowledge of what he testified to. But most of all those protestations, if any, were not relevant. Protests and complaints other than judicial proceedings do not count in the reckoning of periods of limitation but they may be relevant in seeking extension of time. All in all, therefore, we are of the view that there was no basis for holding that the suit was instituted in time. It is clear to us that the period of limitation ran its full course on the due date in 1986.

It is not necessary to say much about the appellant's harping on his constitutional rights. As conceded by him at the hearing, the basic rights were enacted into the Constitution and became justiciable many years after his father's land was taken away. It was held in *Akonaay* upon which he purported to rely that "the provisions of the Basic Human Rights section are not

retrospective” (page 95H). And so it is in this case. Article 22(4) cannot be relied upon to determine the validity of confiscations of property that took place in 1974. This is not to say that the confiscation of the property in question had any basis in law; what is at issue is that it could and should have been challenged at the appropriate time even though no Bill of Rights existed at the time.

The appeal is dismissed with costs to the first respondent. As the District Court rightly observed, the appellant should count himself lucky that the respondents never appealed against the decision of the primary court.

The appellant and the respondent both appeared in person.

For the appellant:

Appeared in person

For the respondent:

Appeared in person

GITHUNGURI V REPUBLIC

NO. 180 OF 1985; [1985] LLR 3090(HCK)

[1] Constitutional Law – Interpretation of section 26 of the Constitution of Kenya – Powers of the Attorney General to institute and undertake criminal proceedings – Whether High Court has inherent power to supervise exercise of such power.

Editor's Summary

The application before court was made under section 67(1) of the Constitution for reference to High Court of the issue whether Attorney General's office had properly exercised its power under section 26 of the Constitution in reviving charges against the applicant.

The applicant had been charged in a subordinate court with counts of offences under the Exchange Control Act.

It was the applicant's case that the charges against him had been the subject of a police investigation six years earlier and the office of the Attorney General then, decided not to prosecute the accused which decision was communicated to the accused.

Held – Notwithstanding the powers of Attorney General under section 26(b) of the Constitution, the High Court has an inherent power to secure fair treatment for all persons who are brought before it or subordinate court and to prevent an abuse of the process of court.

The Attorney General is given unfettered discretion to institute and undertake criminal proceedings by section 26 of the Constitution but this discretion should not be exercised injudicious way. It should not be exercised arbitrarily oppressively or contrary to public policy.

The right of the Attorney General's office to change its decision not to prosecute a person may be lost if the accused has been publicly informed that he will not be prosecuted and his property which was seized in investigating the alleged offence has been restored to him. The accused person may have destroyed or lost his evidence as a consequence of being led to believe that there would be no prosecution.

Cases referred to in judgment

("A" means adopted; "AL" means allowed; "AP" means applied; "APP" means approved; "C" means considered; "D" means distinguished; "DA" means disapproved; "DT" means doubted; "E" means explained; "F" means followed; "O" means overruled)

United Kingdom

Connelly v DPP [1964] 2 All ER 401

DPP v Humphreys [1976] 2 All ER 497

Republic v Brentford Justices ex parte Wong [1981] 1 All ER 884

Republic v Grays Justices [1982] 3 All ER 653

Judgment

SIMPSON CJ, SACHDEVA AND MBAYA JJ: This is a reference to the High Court under section 67(1) of the Constitution which reads as follows:

“Section 67(1) where a question as to the interpretation of this Constitution arises in proceedings in a subordinate court and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if a party to the proceedings so requests, refer the question to the High Court.”

The subordinate court concerned was the court of the Chief Magistrate before which on 20 May 1985 one Stanley Munga Githunguri was charged with four counts alleging contraventions of the Exchange Control Act (Chapter 113).

Two of the offences are alleged to have been committed in 1976 and the third in 1979. The fourth count is an alternative to the third count.

Mr *Georgiadis* who appeared for the accused with Mr *Lakha* and Mr *Opiyo* both in the Chief Magistrate's Court and before us made a preliminary application to the Chief Magistrate.

With reference to the charges before the court Mr *Georgiadis* said:

“All the charges formed a part of police enquiry and full investigations were carried out about six years ago. A detailed statement under caution was taken from the accused and charges were prepared and were 20 in number. These were signed by the officer in charge, Mr Shapi. The charges before the court formed a part of the charge prepared earlier. A copy of such charges was given to accused six years ago together with a copy of his cautionary statement.”

Subsequently in early 1980, the office of the Attorney-General having considered everything decided not to prosecute the accused and closed the files relating to all counts including the present ones. Further it issued instructions to credit in Kenya currency the accused bank account with equivalent amount of foreign currency in the charges now before the court. Indeed the accused was told in writing by his bank, and more importantly, he was told officially of the Attorney-General's decision and not to prosecute as the files were officially closed. This status quo prevailed through

the successors of the office of the Attorney-General in the time of Mr Karugu and Mr Kamere who followed the then Attorney-General.

“The position was reiterated publicly during a debate in parliament when Mr Kamere was the Attorney-General. I wish to put the two reports - dated 20 June 1981 (pages 599-608). Also National Assembly Report of 12 July 1981 (pages 765-774).

That is where the matters rested four years ago until three charges with an alternative charge were resurrected and the accused was charged despite all previous assurances by police and investigation branch that the matters were settled and he would not be prosecuted. Despite these assurances the accused was again called at CID Headquarters and he was charged.”

He then referred to the powers of the Attorney-General under section 26 of the Constitution and formulated the following five questions being points of law arising from interpretation of that section which he requested the Chief Magistrate to refer to the High Court under section 67 of the Constitution:

- “(1) If the office of the Attorney-General makes a decision not to institute or undertake any criminal proceedings against any person, is the power conferred under section 26(3) exhausted or spent?
- (2) Does the exercise of the power conferred on the office of the Attorney-General under section 26(3) have to be fair and reasonable, or can it be exercised arbitrarily or oppressively?
- (3) Is it a proper exercise of the powers conferred under section 26(3)(a) to institute criminal proceedings against a person charging him with offences allegedly committed over eight years ago and investigated about six years ago following a full inquiry, and after the office of the Attorney General had then decided not to institute or undertake criminal proceedings and to close the files?
- (4) Notwithstanding the powers conferred upon the office of the Attorney-General by section 26(3) of the Constitution, does the court have an inherent power and a duty to secure fair treatment for all persons who come or are brought before the court, and to prevent an abuse of its process?
- (5) Is such a charge or charges against any person preferred nine years after their alleged commission and six years after a full inquiry in respect thereof and five years after the decision of the office of the Attorney-General not to prosecute and to close the file:

“(a) vexatious and harassing; and/or

(b) an abuse of the process of Court; and/or

(c) contrary to public policy?”

Mr *Chunga* who appeared for the Republic agreed. He said:

“Having heard the defence counsel’s speech, I was in any case to ask this Court to refer the questions to be put before the High Court.

As to evidence, it is the choice of the defence to choose.”

The Learned Chief Magistrate then ruled that the “questions raised by the defence and so agreed by the prosecution being questions of interpretation of section 26 of the Constitution and allied matters thereto” be referred to the High Court.

Before us Mr *Chunga* raised a preliminary objection seeking to strike out questions 2 to 5 which he submitted were outside the scope of the court’s constitutional functions. The constitutional point the court was asked to interpret he said, was contained in the first question. The manner in which the Attorney-General exercised his powers was not a matter for a constitutional court which has no discretion or jurisdiction to inquire whether the powers are being exercised fairly or oppressively. The function of the court was merely to interpret the section and having interpreted it to remit the matter to the trial court to dispose of the case in accordance with the court’s decision.

We dismissed this objection and reserved our reasons. These we now give briefly.

It was mandatory for the Chief Magistrate to refer the questions to the High Court. The accused through his counsel had requested that the questions be referred to the High Court and the Chief Magistrate was of the opinion that substantial questions of law pertaining to the interpretation of section 26 of the Constitution were involved. Not only had the accused made the request but Mr *Chunga* said, “I was in any case to ask this court to refer the questions to be put before the High Court”. If he objected to any of the questions he should, we think, have raised his objections in the subordinate court.

Section 26 of the Constitution reads as follows:

- “(1) There shall be an Attorney-General whose office shall be an office in the public service.
- (2) The Attorney-General shall be the principal legal adviser to the government of Kenya.
- (3) The Attorney-General shall have power in any case in which he considers it desirable so to do:

- (a) To institute and undertake criminal proceedings against any court (other than court-martial) in respect of any offence alleged to have been committed by that person;
 - (b) To take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and
 - (c) To discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.
- (4) The Attorney-General may require the commissioner of police to investigate any matter which, in the Attorney-General's opinion, relates to any offence or alleged offence or suspected offence, and the commissioner shall comply with that requirement and shall report to the Attorney-General upon the investigation.
- (5) The powers of the Attorney-General under sub-sections (3) and (4) may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions.
- (6) The powers conferred on the Attorney-General by paragraphs (b) and (c) of sub-section (3) shall be vested in him to the exclusive of any other person or authority:

Provided that where any other person or authority has instituted criminal proceedings, nothing in this sub-section shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.

- (7) For the purposes of this section, an appeal from a judgment in criminal proceedings before any court, or a question of law reserved for the purpose of those proceedings to any other court, shall be deemed to be part of those proceedings:

Provided that the power conferred on the Attorney-General by sub-section (3)(c) shall not be exercised in relation to an appeal by a person convicted in criminal proceedings or to a question of law reserved at the instance of such a person.

- (8) In the exercise of the functions vested in him by sub-sections (3) and (4) of this section and by sections 44 and 55, the Attorney-General shall not be subject to the direction or control of any other person or authority."

Sub-section (3) with which we are mainly concerned confers wide powers upon the Attorney-General. They are not however spelt out in every conceivable aspect. This applies also to several other provisions of the Constitution. Hence the provision for a reference to the High Court. We are

not restricted to an interpretation of the words in their ordinary and nature which the Attorney-General is required to carry out his functions are not excluded. We are satisfied that each question posed relates to the interpretation of section 26. Even question 4 which concerns the inherent power of the court becomes relevant to the interpretation of section 26 by the words “notwithstanding the powers conferred upon the office of Attorney-General by section 26(3) of the Constitution”.

For the foregoing reasons we dismissed the preliminary objection.

When Mr *Georgiadis* commenced his submissions on the substantive reference he said, “The facts are undisputed”. Mr *Chunga* intervened to say that the facts were not undisputed. We found this statement surprising although no rules of procedure have been made for the hearing of such references. It is usual for the facts to be agreed before a reference is made on a point of law. In the present case despite some remarks made by both counsel in the lower court regarding the matter of calling evidence we were under the impression that the facts stated by Mr *Georgiadis* had been agreed by Mr *Chunga* in which case no evidence would be necessary. The Chief Magistrate also in making his ruling must have assumed that the facts on which the questions were based were agreed. While Mr *Chunga* in the proceedings before us from time to time protested that no evidence had been led, at no time did he specifically deny any fact on which Mr *Georgiadis* relied.

In the Chief Magistrate’s Court Mr *Chunga* heard the facts narrated in open court, raised no objection and indeed was himself anxious that the questions based on these facts be referred to the High Court. He heard the extracts from the National Assembly Reports being read but gave no indication that it was not accepted that the counts now before the Chief Magistrate were not among the 20 charges referred to in parliament. When the matter was mentioned before the Chief Justice on 3 June 1985, he said he would raise a preliminary point with regard to questions 2 to 5. He said nothing about any intention to dispute the facts. Nor did he do so in the course of making his preliminary objection.

With respect to the Parliamentary Reports he submitted that Mr *Georgiadis* had to prove that the present charges were amongst the previous proposed charges and attempted to show by reference to the Reports that at least some of the 20 proposed charges had nothing to do with the charges before the Chief Magistrate. Asked by the court if the charges before the Chief Magistrate were among the 20 proposed charges Mr *Chunga* replied that he did not know. At the request of the court he was handed a copy of the 20 proposed charges by Mr *Georgiadis*. Mr *Chunga* later confirmed that the charges were amongst the previous 20. At the time he stated that he was

instructed to indicate that inquiries would have to be carried out to establish how the list of 20 proposed charges came to be in possession of the accused.

We think that for the purposes of this reference we are entitled to assume that the relevant facts are as stated by Mr *Georgiadis* and accepted without demur by Mr *Chunga* in the Chief Magistrate's Court.

Mr *Georgiadis* in his submissions conceded that except where limitation is imposed by statute there is no time limit to the prosecution of serious offences such as murder. He referred to various articles in legal publications on the subject of the powers and duties of the Attorney-General in England. While bearing in mind the absence of a written Constitution in England we think that the principles emerging from these authoritative statements are principles which having regard to Kenya's adherence to the democratic system and respect for the rule of law should be followed by the Attorney-General.

In an article in the *International and Comparative Law Quarterly* Volume 22 (1973) entitled "Control of Prosecutions in the United Kingdom" by Bernard M Dickens the learned author at page 11 had this to say about the functions of the Director of Public Prosecutions:

"It is recognized that 'on reason ... for the selection of offences as requiring the consent of the director is to protect members of the public from oppressive prosecution,' but the basic issue in all cases is whether, in the whole of the circumstances, the public interest requires that the proceedings should be taken in a particular case. Where conduct constitutes breach of the strict letter of the law but does not violate its spirit, or a clearly shown offence was committed long before, or committed by a person whose circumstances or character are shown to have changed, no proceedings may be considered necessary."

Sir Elwyn Jones when he was Attorney-General wrote (*Cambridge Law Journal* April 1969 at 49:

"The decision when to prosecute, as you may imagine, is not an easy one. It is by no means in every case where a law officer considers that a conviction might be obtained that it is thought desirable to prosecute. Sometimes there are reasons of public policy which make it undesirable to prosecute the case. Perhaps the wrongdoer has already suffered enough. Perhaps the prosecution would enable him to present himself as a martyr. Or perhaps he is too ill to stand his trial without great risk to his health or even to his life. All these factors enter into the consideration."

Sir Hartley Shawcross said in the House of Commons:

"The truth is that the exercise of a discretion in a quasi-judicial way as to whether or when I must take steps to enforce the criminal law is exactly one of the duties of the office of the Attorney-General, ... It has never been the rule in this country. I

hope it never will be that suspected, criminal offences must automatically be the subject of prosecution. The public interest ... is the dominant consideration."

(*Discretion in Prosecuting* by Glanville Williams (1956) Criminal Law Review at 222).

The Attorney-General in Kenya by section 26 of the Constitution is given an unfettered discretion to institute and undertake criminal proceedings against any person "in any case in which he considers it desirable so to do." As Sir Hartley Shawcross said this discretion should be exercised in a quasi-judicial way. That it should not be exercised arbitrarily, oppressively or contrary to public policy. The decision however is his alone. He "shall not be subject to the direction or control of any other person or authority" (section 26(8)). This includes Judges and magistrates in relation to the decision to institute criminal proceedings. Once proceedings have been instituted before a court the court has discretion to regulate its own proceeding subject, however, to the provisions of the Criminal Procedure Code (Chapter 75).

Do magistrates have in addition inherent powers to refuse to hear a summons if the prosecution amounts to an abuse of the process of the court? In *Republic v Brentford Justices ex parte Wong* [1981] 1 All ER 884 it was held by Donaldson CJ and Mustill J that magistrates in England had such a discretion. No East African authority attributing such powers to magistrates has been cited to us and we can foresee dangers arising from attributing such discretion to magistrates many of whom are without legal qualifications and unlike magistrates in England have no legally-qualified clerk to advise them. Furthermore, the prosecutors in Magistrates' Courts are generally legally unqualified. We are not persuaded that in Kenya they have discretion to refuse to hear a criminal case prosecuted by the Attorney-General or his representative on the ground that it is an abuse of the process of the court.

Mr *Chunga* conceded that the High Court has inherent jurisdiction and that a person charged before a subordinate court and considering himself to be the victim of oppression may seek a remedy in the High Court by way of an application for a prerogative order. We have no doubt that he is correct and that Judges of the High Court have a similar discretion in respect of offences triable before them. (*Connelly v DPP* [1964] 2 All ER 401 cited by both counsel). It is a power to be exercised very sparingly, however.

In *DPP v Humphreys* [1976] 2 All ER 497 Lord Salmon said (at 527-8):

"I respectfully agree with my noble and Learned friend, Viscount Dilhorne, that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not have been brought. It is only if the prosecution amounts to an abuse of the process of the court

and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is in my view, of great constitutional importance and should be jealously preserved.”

May LJ in *Republic v Grays Justices* [1982] 3 All ER 653 had this to say regarding prohibition of the further prosecution of proceedings (at 658):

“Certainly there must be some abuse of the process of the court, some at least improper and it may be *mala fide* use of its procedure, before an order of judicial review in the nature of prohibition will be made.

In our opinion, although delay of itself, with nothing more, if sufficiently prolonged, could in some cases be such as to render criminal proceedings brought long after the events said to constitute the offence both vexatious and an abuse, we do not think delay of the order that there has been in and in the circumstances of this case can be so described.”

The delay in that case was only two years. The delay in the present case from the dates of commission of the alleged offences is nine years in the case of two of the counts and six in the case of the other two. As may be seen from the National Assembly Official Report for 30 June 1981, the Attorney-General “never went beyond what is called an inquiry” which resulted in 20 proposed charges. The inquiry never went to court. The file was brought to the office of the Attorney-General and he was satisfied that there was no evidence against Mr Githunguri. Mr *Chunga* has conceded that the present four charges were amongst those proposed 20 charges.

As stated in the Chief Magistrate’s Court and forming part of the basis for this reference instructions were issued by the Attorney-General’s office to credit the accused’s bank account in Kenya currency with the equivalent amount of the foreign currency specified in the charges before the Chief Magistrate. The accused was informed of this in writing by the bank and was told officially of the decision of the Attorney-General not to prosecute as the files were officially closed.

In the light of the foregoing we take the view that to institute proceedings now is both vexatious and abuse of the process of the court. In the present proceedings, however, we can do no more than answer the questions contained in the reference. The incumbents of the office of the Attorney-General are one but just as one incumbent may, having reached a decision not to prosecute, change his mind in the light of subsequent events so may a later incumbent. We think the right to change the decision may be lost if as in the present case the accused has been publicly informed that he will not be prosecuted and property has been restored to him. As a consequence of being led to believe there would be no prosecution the accused may have destroyed or lost evidence in his favour.

We now answer the questions before us as follows:

- “(1) If the office of Attorney-General makes a decision not to institute or undertake any criminal proceedings against any person the power conferred under section 26(3) of the Constitution is not exhausted or spent.
- (2) The exercise of the power conferred on the office of the Attorney-General under section 26(3) should be fair and reasonable and should not be exercised arbitrarily or oppressively.
- (3) It is a proper exercise of the powers conferred under section 26(3)(a) to institute criminal proceedings against a person charging him with offences allegedly committed over nine years ago following a full inquiry, and after the office of Attorney-General had then decided not to institute or undertake criminal proceedings and to close the file provided that nothing further has been done such as for example informing the person concerned that no proceedings will be instituted or returning to him or disposing of any property involved.
- (4) Notwithstanding the powers conferred upon the office of the Attorney-General by section 26(3) of the Constitution the High Court (and not any subordinate court) has an inherent power and a duty to secure fair treatment for all persons who are brought before the court or a subordinate court and to prevent an abuse of the process of the court.
- (5) The preferment of a charge against any person nine years after the alleged commission of the offence charged six years after a full inquiry in respect thereof and five years after the decision of the office of the Attorney-General not to prosecute and to close the file is:
 - (a) vexatious and harassing,
 - (b) an abuse of the process of the court, and
 - (c) contrary to public policy.”

Unless good and valid reasons exist for doing so, such as for example the discovery of important and credible fresh evidence or the return from abroad of the person concerned.

Thus the Chief Magistrate is at liberty to proceed with the trial unless the Attorney-General in the light of our answers decides (as we hope he will) to terminate the proceedings or the accused applies for a prerogative order.

For the applicant:
Mr Georgiadis

For the respondent:
Mr Chunga

IBINGIRA AND OTHERS V UGANDA

NO. 63 OF 1966; [1966] LLR 268 (CAU)

[1] *Constitutional Law – Fundamental Right and Freedoms – Right to personal liberty and movement – Whether the provisions of the Deportation Ordinance are void for being unconstitutional.*

Editor's Summary

This is an appeal from the order of the High Court dismissing an application for *habeas corpus*. The appellants had been held in custody pending a decision by the minister as to whether or not an order for their deportation should be made under the Deportation Ordinance.

The issue for determination is whether the Deportation Ordinance is to be regarded as void as being inconsistent with the 1962 Uganda Constitution.

Held – The Deportation Ordinance was in contravention of section 28 of the Uganda Constitution and was in violation of freedom of movement.

Section 28 of the Uganda Constitution guarantees right to personal liberty and freedom to movement

No cases referred to in judgment

Judgment

SPRY AG VP: This is an appeal from an order of the High Court of Uganda, dismissing an application for a writ of *habeas corpus*. The appeal is concerned with a single question, whether the Deportation Ordinance (Chapter 46) (to which we shall refer as the Ordinance) is to be regarded as void, as being inconsistent with those provisions of the 1962 Constitution of Uganda (to which we shall refer as the Constitution), which relate to the fundamental rights and freedoms of the individual.

There can be no doubt that if there is such inconsistency, then, to the extent of the inconsistency, the Ordinance is void. This is expressly provided in section 1 of the Constitution, which reads:

- “(1) This Constitution is the supreme law of Uganda and, subject to the provisions of section 5 and section 6 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”

It was argued in the High Court that the Ordinance had expressly been saved by section 4 of the Uganda (Independence) Order in Council 1962. The learned judges rejected that submission, relying on section 1 of the Constitution, and we think, with respect, that they were undoubtedly correct. The qualifications in section 4 of the Order in council and the provisions of section 9 lead to the same conclusion.

If the submission made on behalf of the appellants are correct, the Ordinance is, of course, only void to the extent that it is inconsistent with the Constitution but the inconsistencies that are alleged are of so fundamental a nature that a finding in favour of the appellants would, for all practical purposes, amount to a finding that the Ordinance was abrogated by the enactment of the Constitution.

Briefly, the Ordinance empowers the deportation of any person from one part of Uganda to another part. There is no right of appeal from an order of deportation and an order remains in force until varied or rescinded. So long as an order remains in force, the deportee may not leave the part of Uganda to which he has been deported and he may be subject to various other restrictions.

Before an order of deportation may be made, there must be an inquiry held by a judge, who must furnish a report to the Minister. The proposed deportee has the right to be present at the inquiry and may be represented by counsel. Affidavit evidence may be admitted and if the Attorney-General so certifies the identity of the deponent and any facts that might tend to disclose such identity may be withheld and the deponent is not liable to cross-examination. The judge reports to the Minister and the report is not communicated to anyone other than the Minister except by his authorization. In deciding whether or not to make an order of deportation, the Minister is not bound by any finding or recommendation that the judge may have made.

The main arguments before the High Court and before us were based on section 19 and section 28 of the Constitution, the relevant parts of which read as follows:

“19(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say:

- (j) To such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Uganda or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make

to any part of Uganda in which, in consequence of any such order, his presence would otherwise be unlawful.

- 28(1) No person shall be deprived of his freedom of movement, and for the purposes of this section the said freedom means the right to move freely throughout Uganda, the right to reside in any part of Uganda, the right to enter Uganda and immunity from expulsion from Uganda.
- (2) Any restriction on a person's freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.
- (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision:
- (a) For the imposition of restrictions, by order of a court, that are reasonably required in the interests of defence, public safety or public order on the movement or residence within Uganda of any person;
 - (b) For the imposition of restrictions by order of a court, on the movements or residence within Uganda of any person either in consequence of his having been found guilty of a criminal offence under the law of Uganda or for the purpose of ensuring that he appears before a court at a later date for trial of such criminal offence or for proceedings preliminary to trial or for proceedings relating to his extradition or other lawful removal from Uganda;
 - (c) For the imposition of restrictions that are reasonably required in the interests of defence, public safety, public order, public morality or public health on the movement or residence within Uganda of persons generally, or any class of persons, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society;
 - (d) For the imposition of restrictions on the freedom of movement of any person who is not a citizen of Uganda;
 - (e) For the imposition of restrictions on the acquisition or use by any person of land or other property in Uganda;
 - (f) For the imposition of restrictions upon the movement or residence within Uganda of public officer; or
 - (g) For the removal of a person from Uganda to be tried outside Uganda for a criminal offence or to undergo imprisonment in some

other country in execution of the sentence of a court in respect of a criminal offence under the law of Uganda of which he has been convicted.

- (4) If any person whose freedom of movement has been restricted by the order of a court by virtue of such a provision as is referred to in sub-section.
- (3)(a) Of this section so requests at any time during the period of that restriction not earlier than six months after the order was made or six months after he last made such request, as the case may be, his case shall be reviewed by that court or, if it is so provided by law, by an independent and impartial tribunal presided over by a person appointed by the Chief Justice.
- (5) On any review by a court or a tribunal in pursuance of sub-section (4) of this section of the case of any person whose freedom of movement has been restricted, the court or tribunal may, subject to the provisions of any law, make such order for the continuation or termination of the restriction as it may consider necessary or expedient.”

We should perhaps explain, for the sake of clarity, that at the time of the hearing before the High Court, no order of deportation had been made: the appellants were held in custody pending the Minister’s decision whether or not such an order should be made. It is, we think, clear that, whatever the Minister’s decision might eventually be, the appellants could properly be held in custody if a valid order of deportation was capable of being made; if, however, the Ordinance was void as conflicting with the Constitution and consequently a valid order could not be made under it, then clearly their detention while the exercise of a non-existent power was being considered would be unlawful.

The learned judges in the High Court said:

“We are of the opinion that where a person is detained in custody by virtue of a lawful order issued by a competent authority, an order which does not infringe the protection of the right to a person’s liberty afforded by section 19 of the Constitution, then the protection of the freedom of movement provided by section 28 becomes irrelevant because of the express provisions made by sub-section (2) of that section. We do not accept Mr Masika’s submission that the applicants should be regarded as a ‘class of persons’ within the meaning of section 28(3)(c).”

And later:

“We do not doubt that the Deportation Ordinance could, in certain circumstances, lend itself to abuse and is unsatisfactory in some respects, but we are of the opinion that the Deportation Ordinance falls squarely within the provisions of paragraph (j) of sub-section (1) of section 19 of the Constitution, and does not infringe any other relevant provision of

the Constitution. We therefore hold that neither the Deportation Ordinance nor any material part thereof is void as being inconsistent with any of the provisions of the Constitution.”

Counsel for the appellants submitted that the learned judges of the High Court had erred in looking first at section 19 and being satisfied that it authorized the detention of the appellants, virtually ignoring section 28. He argued that paragraphs (a) and (b) of sub-section (3) of section 28 permit legislation providing for the restriction of the movements of individuals but only where the orders are to be made by courts. Paragraph (c) relates to restrictions on the general public or classes of persons and does not permit the restriction of individuals. (Here, we may observe in passing that we respectfully agree with the learned judges that the appellants cannot be regarded as a class of persons). As regards paragraph (d), it has never been suggested that the appellants are other than citizens of Uganda. Paragraphs (f) and (g) have obviously no relevance. Therefore, in counsel for the appellants submission, any statute which purports to allow the restriction of individuals who are citizens of Uganda, not being within the exceptions set out in sub-section (3), offends against section 28 and is consequently void.

Counsel for the state argued that the human rights set out in Chapter 3 of the Constitution are set out in the order of their importance and that so far as any two overlap the less grave yield to the more grave: thus a person who forfeits his right to life cannot complain that he is incidentally deprived of his liberty and a person who forfeits the right to liberty cannot complain that he is losing his freedom of movement. While there is merit in this argument, it is unnecessary for us to consider how far it is valid, as the relationship of section 19 and section 28 is expressly governed by paragraph (j) of section 19(1), which provides that lawful orders under a statute restricting freedom of movement are not to be regarded as in contravention of the right to personal liberty, and sub-section (2) of section 28, which provides that the restriction on a person's freedom of movement which is inherent in his lawful detention is not to be regarded as in contravention of the right to freedom of movement.

Counsel for the State submitted that an order of deportation is “authorized by law” within the meaning of section 19(1), because it is made under statutory power and the statute, that is, the Ordinance, is authorized by section 19(1) itself. He submitted that “lawful” in paragraph (j) of that sub-section merely means in compliance with the procedure prescribed by the statute. He argued further that while paragraphs (a) to (d) relate to judicial proceedings, paragraphs (e) to (f) relate to executive or administrative action and do not specify the manner in which the liberty of the individual may be restricted or taken away.

We cannot accept these arguments. Ultimately, they depend on the proposition that section 19 authorises legislation for the restriction of the movements and residence of individuals. In our view, it does not do so. All that paragraph (j) does, as

we have said, is to provide that lawful orders made under a statute restricting freedom of movement shall not constitute violations of the right to personal liberty. To decide whether such a statute accords with the Constitution, it is, however necessary to look at the appropriate section of the Constitution, which is we think, clearly section 28. On this question, we accept the appellants' paragraph of section 28(3) and we think, therefore, that, at least so far as it purports to affect citizens of Uganda it contravenes section 28 and is in violation of the right of freedom of movement. If that is so, it follows that, at least to that extent, it was abrogated by the coming into force of the Constitution, immediately before 9 October 1962. It follows necessarily that no lawful order can be made against a citizen of Uganda under the Ordinance and since any order that might be made would be unlawful, paragraph (j) of section 19(1) can have no application. This appeal must therefore succeed.

In view of this decision, it is fully unnecessary to counsel the appellants' second argument that section 24 of the Constitution applies. We may say however, that we incline to the opinion that section 24 has no relevance and we note, in this connection, that state counsel's observation that there is no allegation that any of the appellants has committed any criminal offence.

It may be that the Ordinance was inconsistent with an earlier Constitution but no such submission was made to us and it is unnecessary for us to consider it.

We have considered what is the appropriate order for us to make, as to which no representations were made to us. We think we should set aside the order of the High Court and remit the proceedings to that Court with a direction that a writ of *habeas corpus* be issued as prayed. It is accordingly so ordered. The appellants are to have their costs in this Court and in the Court below.

For the appellant:
Mr JWR Kazzora

For the respondent:
Attorney-General

KALINGA V KARUMWANA

NO. 630 OF 1991; [1991] LLR 244 (CAT)

[1] *Constitutional Law – Fundamental Rights and Freedoms – Rights to personal Liberty – Whether provisions of the Criminal Procedure Code allowing Director of Public Prosecution to certify that accused persons are not entitled to bail is unconstitutional.*

Editor’s Summary

The applicants were facing a trial for indecent assault and had been refused bail on the ground that safety of the members of public will be prejudiced pursuant to a DPP’s certificate as provided for under the Criminal Procedure Code.

The issue for determination before court was the constitutionality of section 148(4) of Criminal Procedure Code and DPP’s certificate filed on the basis of the same.

Held – An application of a similar nature is pending before Court of Appeal and the court would await its outcome.

Cases referred to in the ruling

(“A” means adopted; “AL” means allowed; “AP” means applied; “APP” means approved; “C” means considered; “D” means distinguished; “DA” means disapproved; “DT” means doubted; “E” means explained; “F” means followed; “O” means overruled)

United Kingdom

Delaney v TP Smith Limited [1946] 2 All ER 23

Morris v Marsden and another [1952] 1 All ER 925

Thompson v Ward [1953] 1 All ER 1169

Ruling

RAMADHANI, MNZAVAS, AND MAPIGANO AJA: This is the third appeal between the parties, the matter having started in Vwawa Urban Primary Court in Mbozi District. So for the sake of clarity and simplicity we shall refer to the parties by their first names rather than by appropriate legal labels.

Omari Karumwana unsuccessfully sued Jela Kalinga at the Primary Court for the repossession of a certain plot. Needless to say he was aggrieved and so appealed to the District Court of Mbozi where he succeeded. It was then the turn of Jela to go to the High Court at Mbeya to challenge that decision.

However, he failed to persuade Mtenga J and he thus lost again. But as his morale is high, Jela has finally come to us after obtaining a certificate from Mwaikasu J that there is a point of law at stake. Thus Omari was the original plaintiff while Jela was the original defendant. Now before us Omari is the respondent and Jela is the appellant.

The facts of the matter are as simple as their issues are intertwined. The Regional CCM celebrations of the 5 February 1985 were held in Mbozi District. The District Celebrations Committee identified the site on which to hold the festivities and decided that it should be fenced by building cottages all around to turn it into a stadium, so to speak. The District Celebrations Committee, as would be expected, was under the chairmanship of the District Commissioner while the District Cultural Officer, one Nicodemus Mwankemwa (PW2) was its Secretary. A building Sub-Committee (hereinafter referred to as the sub-committee) whose composition was not spelled out in evidence, was established and charged with the task of issuing out plots to interested persons for building cottages. Both Omari and Jela were allocated plots which were separated by an interspace. A public latrine was built on the interspace leaving passages on either side of the latrine. After the celebrations were over it was decided to block-up the passages. Omari was permitted by PW2 to build a wall to connect his cottage to the side of the public latrine adjacent to him. When he was about to put up a roof he left for Dares Salaam and, on his return, Omari found both the wall he had constructed and the public latrine demolished and Jela was in the process of creating a new cottage thereon having been permitted to do so by both the District Land Officer, one Paul Nyalusi (DW2) and District Medical Officer called Senga Senga (DW3). It was the same DW3 who had earlier on given a written authority to one Sadoki to demolish the public latrine and the wall of Omari. Naturally, Omari confronted Jela who ignored his protests and proceeded with his construction work. That sent Omari to the Primary Court, as said earlier, suing Jela for trespass.

The point of law that was certified to us briefly was this:

“Since the sub-committee was the one with the authority to allocate plots at the stadium and as neither Omari nor Jela obtained possession of the plot in dispute from the sub-committee, could either one of them be said to have acquired a good title.”

Mr *Batenyunga*, learned counsel for Jela, the appellant presented a memorandum of appeal containing four grounds of appeal. The first ground was that the learned Judge erred to find Jela to be a trespasser as that issue could not arise in the circumstances of this case. The second ground was that the judge erred to declare Omari to have had a better title while there was a finding of a double allocation. The third ground was that the Judge erred to

have denied compensation to Jela on the ground that he was a trespasser. Lastly, that the Judge erred to have granted the plot to Omari while none of them had a better title because of the double allocation.

Mr *Bateyunga* before us submitted that since the sub-committee did not allocate the plot to either Omari or Jela then none of them had good title. Therefore, the counsel argued, Omari had no right to sue Jela who could never be a trespasser. Mr *Bateyunga* prayed that the decision of the Primary Court be restored.

On the other hand, Mr *Mwangole*, learned Counsel for Omari, the respondent, argued that there was no double allocation as Omari was given the plot by PW2 on behalf of the sub-committee. On the contrary, the counsel submitted, Jela had no good title as both DW2 section 2 and 3 no authority to issue plots. However, Mr *Mwangole* could not refer us to any evidence to support his contention that PW2 issued the plot in dispute to Omari on behalf of the sub-committee.

It was the finding of the lower Courts that the sub-committee was the proper authority to allocate plots at the stadium. It was equally settled that the said sub-committee did not issue the plot in dispute to any of the parties. So we are of the same opinion that in law neither of the two had a better title than the other. But in such a situation can there not be trespass?

The foundation of an action for trespass to land is possession. It was decided in *Delaney v TP Smith Limited* [1946] 2 All ER 23 that to maintain trespass against a wrongdoer it is not necessary that the plaintiff's possession should be lawful. But that is not the case if the action is against the lawful owner. As there was no lawful owner in this case the question then is which of the two had possession, albeit unlawful, at the time of the dispute.

It has never been disputed at any stage that Omari had actual possession before the demolition and the subsequent construction by Jela. The case of *Thompson v Ward* [1953] 1 All ER 1169 supports the proposition that any one who was in possession or who is deemed to have been in possession at the time of the trespass could bring an action for trespass. So Omari's action was proper.

However, one of the defences against an action for trespass is a claim by the defendant that he had a right to the possession of the land at the time of the alleged trespass or that he acted under the authority of some person having such a right (*Halsbury's Law England* (3 ed) Volume 38 at page 749 paragraph 1226). That has been the defence of Jela. But as already shown he could not have such a right as DW2 and DW3 had no authority to give it to him.

For the sake of completeness we may observe that it could have been argued, though it was not on behalf of Jela that he did not know that he was committing trespass or that he was misled by DW2 and DW3 into occupation. That is very true. However, a person is liable for trespass if he acts voluntarily knowing the nature and the quality of his act even though he does not know the act to be wrongful (See *Morris v Marsden and another* [1952] 1 All ER 925).

Thus we find that Omari had possession of the plot in dispute and that Jela committed trespass. So possession should be restored back to Omari as was the finding of both the District Court and the High Court.

Mr *Bateyuniga* had prayed that in the event we came to the conclusion which we have arrived at, we then should consider awarding compensation to Jela. Mr *Mwangole* was bitterly opposed to that prayer but eventually he conceded. As there was no evidence as to how much money Jela had expended on the structure we direct the District Magistrate to take evidence from the parties and experts like the Government valuers to assess the cost of erecting the building in 1986. Interest on the amount from the date of judgment by the District Court, that is the time when Jela was deposed, to the time of payment of the compensation should be granted as well.

The appeal is dismissed except for compensation.

As the parties were not at fault but were misled into this litigation by other who then became on-lookers, we order each party to bear his own costs.

Before we finish, we may as well comment that Omari suffered some loss when the wall he had built was demolished. But that is a claim which could be brought against DW3 who ordered the demolition and not Jela.

For the appellant:

Mr *Bateyunga*

For the respondent:

Mr *Mwangole*

KEHEGU V TARAYANI
NO. 29 OF 1989; [1989] LLR 90 (HCT)

[1] Constitutional Law – Fundamental Rights and Freedoms – Rights to protection of the property.

Editor's Summary

The appellant successfully sued the respondent in a traditional army (Sungusungu) for his stolen cattle whereupon traditional army ordered that the appellant be compensated his seven heads of stolen cattle.

10 heads of cattle were however attached in execution of the traditional army order. The respondent thereafter successfully sued the appellant for recovery of his 10 heads of cattle at the Primary Court.

The appellant has now appealed to the District Court against that decision.

Held – Under Tanzania Constitution, only courts of law are empowered to try, convict and sentence offenders.

Article 24 of Tanzania Constitution affords every individual right to the protection of his property and that his property can only be taken from him when found liable by a court of law or where there is a legislation allowing confiscation but which provides for adequate compensation.

Appeal dismissed.

No cases referred to in ruling

Ruling

MWALUSANYA J: The appellant, Simango s/o Kehegu was successfully sued at Noreme Primary Court in Serengeti District by the respondent, Athanas s/o Tarayani, in a claim of ten head of cattle which had been unlawfully seized by the traditional army (Sungusungu or Baraza la Jadi) from the respondent and given to the appellant. The appellant appealed to Serengeti District Court and his appeal was partly successful in that he was ordered to refund only seven head of cattle instead of ten. Still aggrieved by that decision, the appellant has now appealed to this court. At the hearing of this appeal, the appellant was represented by Counsel, Mr *Sandhu*.

What happened was that sometime in 1972 the appellant had his seven head of cattle stolen. He suspected the respondent to be the thief. With the

advent of Sungusungu in 1988 the appellant sent the respondent to the Sungusungu to be tried. It is said the respondent was tried and convicted by the Sungusungu and was ordered to compensate the complainant (the appellant) the seven head of cattle. However, when the members of the traditional army were executing the attachment, they attached ten head of cattle from the respondent. It is said only seven head of cattle were handed over to the appellant while three head of cattle were ‘pocketed’ by the Sungusungu.

The trial court ordered the appellant to refund all the ten head of cattle to the respondent. However, the District Court held that appellant should refund only seven head of cattle which he had been given; and that respondent should have sued the Sungusungu for the three head of cattle which they had “pocketed”.

There can be no controversy that the Sungusungu are operating outside the Rule of Law. They have no power to try and convict offenders nor make compensation orders. Under our Constitution only the courts of law are empowered to try, convict and sentence offenders. Under article 13(3) of the Constitution it is stated that:

‘Rights of an individual and the community shall be protected by courts of law and other organs of the government.’

But the traditional army is neither a court of law nor an organ of the government with judicial powers. And article 24 of the Constitution states that every individual has the right to the protection of his property; and that his property may only be taken from him when found liable by a court of law or when there is a legislation allowing confiscation of somebody’s property but which makes adequate compensation for the affected individual. Therefore, it is crystal clear that the traditional army usurped the judicial power which it does not possess under our Constitution. The judicial power is vested in the court of law only. So the conduct of the traditional army in this case was patently unlawful. And the appellant having used an unlawful method for getting redress, must bear responsibility and refund the seven heads of cattle that he was unlawfully compensated. I agree with the learned Senior District Magistrate that the appellant is only liable for seven heads of cattle which he was given. The respondent should have sued Sungusungu that had unlawfully pocketed the three head of cattle.

In the event this appeal fails and it is dismissed with costs. The appellant should refund the respondent only seven head of cattle.

For the appellant:

Mr Sandhu

For the respondent:

Mr Athans

KURIA AND OTHERS V ATTORNEY GENERAL

NO. 966 OF 2000; [2000] LLR 5388 (HCK)

[1] Constitutional Law – The doctrine of double jeopardy as envisaged by section 77(5) of the Constitution – Whether criminal and civil proceedings running contemporaneously as the same issues amount to double jeopardy.

Editor's Summary

The applicant's case is that the matters in the criminal prosecution were precisely the same issues in a civil suit pending before court which action amounts to an overbearing of pressure on the civil process and infringement of his rights under section 77(5) of the Constitution.

The applicants are seeking a Judicial Review order to bar the criminal prosecution.

Held – Nothing stops a court from prohibiting further hearings and/or prosecution of a criminal case where the decision to charge and/or admit the charges have already been made.

The rights as protected under section 77(5) of the Constitution, prevent the re-prosecution of a criminal case which has been determined in one way or another.

It does not, however, mean that a civil suit and a criminal case cannot co-exist at any one particular time.

Cases referred to in ruling

("A" means adopted; "AL" means allowed; "AP" means applied; "APP" means approved; "C" means considered; "D" means distinguished; "DA" means disapproved; "DT" means doubted; "E" means explained; "F" means followed; "O" means overruled)

East Africa

Githunguri v Republic High Court criminal appeal number 271 of 1985 (UR)
Kangwana v Attorney General High Court miscellaneous appeal number 446 of 1995 (UR)
KNEC v Gathenji and others [1996] LLR 483 (CAK)
Macharia and another v Attorney General and another [2000] LLR 1883 (HCK)
Mugo v Republic [1997] LLR 1859 (CAK)
Ndegwa v Republic High Court criminal appeal number 492 of 1988 (UR)

Re: Kamlesh Pattni and others High Court miscellaneous appeal number 1296 of 1998 (UR)

Re: Floriculture International [1998] LLR 4622 (HCK)

Republic v Commissioner of Police Ben Nyamweya High Court miscellaneous appeal number 1404 of 1998 (UR)

United Kingdom

Republic v Criminal Injuries Compensation Board ex parte Lain [1967] 2 QB 864

Others

Keyowski v Republic [1988] 62 CR (3d) 349

Ruling

MULWA J: The applicants are before the Chief Magistrate's court in criminal case number 105 of 2000 charged with two counts each of making a false document contrary to section 347(a) of the Penal Code, forgery contrary to section 349 and uttering a false document contrary to section 353 of the Penal Code. These charges are in relation to two documents i.e. a General Power of Attorney registered as IP/A 31505/1 and a transfer document registered as 17623/14 at the land registry.

At the center of the criminal prosecution as well as the subject matter of a civil dispute between the parties is property number Land Reference number 1012/47/2 located at Roysambu, Kasarani, Nairobi. The property was of the late Mary Hannah Thompson, until her death at Chelsea in Westminster Hospital on 27 August 1993, whereupon it passed onto the administrators of her estate, Sheila Thompson and Anthony Thompson (Sheila and Anthony respectively).

On 26 February 1997 the property was formally transferred to the names of the two administrators. Simultaneously it seems, the general power of attorney was registered at the land registry, whose purport was to appoint Sheila as Anthony's attorney. This document was signed and dated 11 January 1995 and was witnessed by BNA and Advocate. A warrant of arrest is out for this advocate, and no information has been given as to whether the arrest has been effected.

Pursuant to this power of attorney, documents were lodged at the land registry to the effect that Sheila had transferred her interests as well as her brothers (Anthony's) interest, as his lawfully appointed agent, to the applicants save for Mr *Githuka*, the fourth applicant.

Accordingly a transfer document was lodged at the land registry on 6 May 1997 and was registered as 17623/14. This document was purportedly signed

by Sheila on the same date as the agreement for sale on 4 March 1997 on her own behalf as the joint owner as well as on behalf of Anthony as his attorney. This transfer document as well as the agreement for sale were all drawn, witnessed and filed by the fourth applicant, an advocate of the High Court of Kenya. In effect therefore in this conveyance the entire interest of the two administrators in the aforementioned property was transferred to the first three applicants, and as at now the parcel is registered in their names.

It seems however that Anthony got wind of this transfer much later, for on 31 July 1998 he filed a suit with an application under a certificate of urgency through Satish Gautama Advocate in High Court civil case number 1706 of 1998, seeking injunctive relief's against the applicants as well as Sheila from dealing with the property. In the suit, he seeks a declaration that the transfer of the property be set aside, and for a retransfer. In his supporting affidavit (Paragraphs 10, 11, 12 and 13) he avers that the power of attorney was a forgery.

Paragraphs 12, 13, 14 and 15 of the plaint also allude to this state of affairs that the power of attorney was a forgery. However, save for these two documents of pleadings, nothing more was availed before me about the state of the civil suit or what transpired after the documents were filed or if ever further documents were filed.

However, what is clear is that Sheila made a report to the Police about these documents and transactions, alleging that there were forgeries and fraud in the transactions. The criminal prosecution in criminal case number 105 of 2000 is testimony to that, where she is the complainant. This runs in tandem with the defence filed by Sheila dated 9 February 1999 where allegations of fraud are levelled against the first three defendants, as she herself was also one of the defendants in the civil suit. Also sucked into the cyclic web of litigation are three interested parties all claiming a stake in the disputed property through investments. Their assertion in reply to this application has been that the application should not be granted.

The main grounds for the application are that the matters in the criminal prosecution are precisely the same issues which the civil court is seized with at the moment, all at the instigation of Anthony and which the complainant has made several admission in different courts. It is therefore that as these are matters, which are purely civil in nature, and are before a civil court, it would amount to overbearing of pressure onto the civil process to continue the criminal prosecution of the applicants hence the necessity to prohibit the criminal case.

It cannot be gainsaid that the court has the power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters

divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-setting or vilification on issues not pertaining to that which the system was ever formed to perform.

A stay (by an order prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie on society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious, see *Keyowski v Republic* [1988] 62 CR (3d) 349.

KULOBA J: In *Floriculture International* [1998] LLR 4622 (HCK) wanted, which warning I would concur with, that the machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate for the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the courts') independence and impartially (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 77(9) for the civil process). The invocation of the law, by whichever party, in unsuitable circumstances or for wrong ends must be stopped as in these instances, the goals for their utilization is far from that which the courts and indeed the entire legal system is constitutionally mandated to administer, see *Kangwana v Attorney General* High Court miscellaneous appeal number 446 of 1995 (UR) per Khamoni J.

In the instant case the criminal prosecution is alleged to be tainted with ulterior motives, namely to bear pressure on the applicants in order to settle the civil dispute. It is further alleged that the criminal prosecution is an abuse of the court process epitomized by what is termed as selective prosecution by the Attorney General.

For the State, Mr *Okumu* the learned Stated counsel submitted that the object of a prohibition sought in the instant case is to challenge the decision already made by the State to charge the accused persons. To this end, there is nothing for the court to prohibit as the decision to charge the applicants has already been made.

Secondly, it is submitted that the trial court has also already admitted the charges, and therefore there is nothing left for the court to prohibit as regards the learned magistrate and the State.

As I have noted above, it is the duty of the court to ensure that the utilization and/or invocation of its process and the law is not actuated by other considerations so divorced from the goals of justice as to make it ie the court virtually a scapegoat in personal score settling and vendetta. It would be a travesty to justice, a sad day for justice, should the procedures or processes of

court be allowed to be manipulated, abused and/or misused, all in the name that the court simply had no say in the matter because the decision to so utilize the procedures has already been made.

In *Floriculture International* [1998] LLR 4622 (HCK) (*supra*), In the matter of an application by *Kamlesh Pattni and others* High Court miscellaneous appeal number 1296 of 1988 (UR), *Kangwana v Attorney General* High Court miscellaneous appeal number 446 of 1995 (UR), *Francis Njuguna Ndegwa v Republic* High Court criminal appeal number 492 of 1998 (UR), *SK Macharia and another v Attorney General and another* High Court miscellaneous appeal number 356 of 2000 (UR) and *Republic v The Commissioner of Police ex parte Ben Nyamweya* High Court miscellaneous appeal number 1404 of 1998 (UR) the courts were faced with similar applications, applications of the nature that the continued criminal prosecutions would amount to a travesty of justice. At no time in these cases was it argued, as it was here, that because a decision has been made to charge the accused persons, the court should simply as it were, fold its arms and stare as the squabbling litigants/disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit.

The fact that it has not been argued before however does not mean that the law stops dead at its track. As it has always been stated before, an order of prohibition looks to the future and not to the past; it is concerned with the happenings of future events and little, if any, of past events.

Where a decision has been made, like as is submitted before me, there is little that the court can do by an order of prohibition to actually stop the decision from being made, because simply that which is sought to stop has already been done. However, I do not think that in such instances the power of judicial review is limited to the other orders of judicial review other than a prohibition.

In *Kenya National Examinations Council and R ex parte Geoffrey Gathenji and others* [1996] LLR 483 (CAK) the Court of Appeal laid out the grounds in which an order of prohibition can issue, but I am minded to think that this is in relation to civil proceedings ie. Where the substratum of the dispute or the application for judicial review arose out of civil disputes. The grounds in such an instance, espoused by the Court is that an order of prohibition lies not only for excess of jurisdiction but also from a departure of the rules of natural justice.

This is a sound principle, but it also has to be noted that earlier in, *David Mugo t/a Manyatta Auctioneers v Republic* Court of Appeal civil appeal number 265 of 1997 the late Chesoni CJ, Omolo JA and Shah JA quoted with

approval the decision of Lord Parker, Chief Justice in *Republic v Criminal Injuries Compensation Board ex parte Lain* [1967] 2 QB 864 as stating the correct legal position in judicial review matters. Lord Parker Chief Justice has stated that:

“So long as orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions.”

This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. My learned brother Justice Hayanga *In the matter of the Law Society of Kenya Act Chapter 18 Law of Kenya and in the matter of the Judicial Commission of Inquiry in Tribal Clashes in Kenya* High Court (Mombasa) miscellaneous civil application number 141 of 1998 espoused this expansiveness noting that in *Mugo v Republic* (*supra*) it was stated that our law must develop to cover similar or new situations and that the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. I concur with this expansiveness, and in particular the need brought about by the applicability of the remedies of judicial review into criminal proceedings, which necessitates a need for re-evaluation of the principles upon which they are granted as opposed to civil proceedings. In *Floriculture International* (*supra*), Kuloba J laid out broad instances where a prohibition of a criminal prosecution can be granted, amounting in total to twelve. It is therefore imperative that the intrusion of judicial review remedies into criminal proceedings would have the effect of requiring a much broader approach, than as envisaged in *KNEC v Republic ex parte Gathenji* [1996] LLR 483 (CAK) (*supra*).

In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, I do not find any greater duty for the court than to ensure that it maintains its integrity, the integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite to the duty of the court.

It therefore matters not whether the decision has been made or not; what matters is the objectives for which the court procedures are being utilized. As stated time and time again, justice must not only be done but must be seen to be done. Because the nature of the judicial review proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with illegalities and ulterior motives.

Where such a point is reached that the process is an abuse, it matters not whether or not it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus whereas the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision to prosecute i.e. continued and *SK Macharia and another v Attorney General and another* prosecution be stayed, see *Floriculture International (supra)*, *Kangwana v Attorney General (supra)* High Court (Nairobi) miscellaneous appeal number 356 of 2000 (UR).

As can be noted from the above-cited cases, in some instances an order of prohibition was actually issued to prohibit the continued hearing and/or determination of criminal prosecution even where a decision as it were had already been made to prosecute or charge the applicants. Therefore there is nothing which can stop the court from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made. I therefore do not find any merit in this submission.

The first issue raised by the applicants in support of the application, which I will deal with, is that of double jeopardy. It is submitted that by having to undergo the criminal prosecution as well as the civil process, the applicants will suffer double jeopardy.

It is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for the offence or for any other criminal offence of which he could have been convicted at the trial of the offence. See section 77(5) of the Constitution.

What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another. However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid at rest. There is no mention in the section

that the simultaneous existence of civil and criminal cases is constituting double jeopardy.

The courts have however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceeding when he has a civil suit against him relating to matters in the criminal proceedings, see Kuloba J in *Floriculture International (supra)* and Khamoni J in *Kangwana v Attorney General (supra)*.

The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceeding pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution.

As stated above, the constitutional right against double jeopardy envisaged a re-prosecution of an accused person contemporaneously. An example can be found in what are erstwhile called running down cases, ie. accident claims, that it is not unique to find an accused in a traffic court being sued in a civil suit subsequently or concurrently. I do not see how the civil processes or criminal process as the case may be, should be affected by the existence of the other in terms of the rule of double because the two process apply different legal considerations, see *Ndegwa v Republic High Court (Nairobi)* criminal application number 492 of 1998 (UR). In such instances, where there is a co-existence of a civil suit and a criminal case it is rather that a stay be granted on the civil process pending the completion of the criminal case.

The other issue, which was raised by the applicants, which issue encapsulates the other minor issues is that the criminal prosecution is an abuse of the court process. This is because the prosecution is geared to achieve ulterior considerations, backed by a selective prosecution and manipulation of the court process.

Khamoni J in *Republic v Commissioner of Police ex parte Ben Nyamweya (supra)* stated that it should be realized that a prerogative order is an order of a serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law.

I concur with this statement that an order of prohibition should be granted where there is an abuse of the process of the court, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution.

In the instant case, the applicants have stated that there is an abuse of the process of the court by the Attorney General. Several allegations have been levelled against the State that there is selective prosecution, that there is harassment of the applicants and pressure from the State to settle the civil dispute.

Just as the learned state counsel Mr *Okumu* and Khamoni J *ex parte* Nyamweya (*supra*), I have not seen any evidence of all these allegations made against the State. There is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution.

It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused. There is a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In the absence of concrete grounds for supposing that a criminal prosecution is an 'abuse of process', is a 'manipulation' 'amounts to selective prosecution' or 'such other process, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same sets of facts.

The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected by whichever means. In *Githunguri v Republic* High Court criminal appeal number 271 of 1985 (UR) this concern was exemplified thus:

"What kind of a mad man who has an opportunity to apply for an order of prohibition would opt for a criminal trial with the risk of conviction and imprisonment or a fine or both, hanging over his head like the Sword of Damocles."

Given these bi-polar considerations, it is imperative for the court to balance the considerations vis-à-vis the available evidence.

However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence

that there is a manipulation, abuse or misuse of the court process or that there is a danger to the right of the accused person to have a fair trial.

Despite all these blanket allegations, the applicants in support of their application have tendered no evidence. Indeed the present application runs the risk of being an abuse of court process due to the circumstances under which it has been brought. The criminal prosecution is now part heard, four prosecution witnesses have already testified and there are more witnesses lined up to testify. The witnesses who testified all had the opportunity to be examined and cross-examined by the applicants. In fact, in this application, part of the evidence tendered in the criminal case is being put forward for me to consider.

At the same time as painting the criminal process black is an abuse of the court process and tainted with mala-fides, the applicants are busy utilizing the evidence they so obtained in the case. On the other hand, no reason has also been given as to why it took them to have the case part heard before deciding that the existence of the civil suit exposed them to double jeopardy. It is further claimed that part of the witnesses are interested parties in the civil case. Such a claim would in effect sound like the fact that a plaintiff in an accident claim is precluded from testifying in a criminal prosecution on dangerous driving against the driver of the vehicle. The evidence given by a witness is amenable to be proved/disproved and/or disbelieved by the court and therefore the fact that an interested party has or is likely to give evidence does not mean that the court is bound to take the whole evidence unchallenged. It is therefore unmeritorious to make a contention that a particular witness as an interested party in the dispute should be barred from the stand.

As far as the evidence tendered before me indicates, the civil court has not made any determination in either way of the rights of the parties in relation to the suit property. At this stage, therefore, it is difficult to know which of the parties is running before the several courts and at every opportunity so as to manifest his/her perchance for simultaneous court process. However, after participating halfway in the criminal process, the applicants have now brought their combat to the civil court through a miscellaneous application seeking a bar to the criminal case. There is the other civil court dealing with High Court civil case number 1706 of 1998, which is what the applicants want to return to.

To cap it all, the applicants' notice of motion relies on section 84 of the Constitution. Throughout the hearing of this application, not a single of the provisions of section 70 to 83 (inclusive) of the Constitutional Rights of the applicants has been cited before me as having been, is being or is likely to be contravened. I think that the applicants felt a little insecure with the other sections of the law, which they have cited, that is why they made out a

constitutional provision as being apt. Other than merely quoting this section, the applicants have done little else to lay before me any of the wholesome rights enumerated in the bill of rights as having been, is under or is likely to be under threat. This is therefore merely but an afterthought of the applicants to cite constitutional provisions without laying out any evidence, as they have done in this case, in support of it.

In these circumstances, I concur with Khamoni J in *ex parte* Nyamweya (*supra*) that it would be in the interest of the applicants, the respondents, the complainants, the litigants in High Court civil case number 1706 of 1998 and the public at large that the claimant prosecution be heard and determined quickly in order to know where the truth lies and set the issues at rest giving the applicants a chance to clear their names.

Accordingly, this application is dismissed with costs to the State.

For the appellant:

Information not available

For the respondent:

Mr Okumu

LAURANCE V GOVERNMENT OF ZANZIBAR

NO. 17 OF 2002; [2002] LLR 86 (CAT)

[1] *Constitutional Law – Fundamental Rights and Freedoms – Whether a sentence committing accused person to jail instead of education centre is unconstitutional.*

Editor’s Summary

The appellant had been convicted for unlawful possession of narcotic drug. He appealed on the grounds *inter alia* that the sentence of 15 years in an education centre was unconstitutional, excessive and degrading.

Held – Conviction set aside on the grounds that exhibits were tampered with. Court did not therefore consider constitutionality of the sentence.

Case referred to in judgment

(“A” means adopted; “AL” means allowed; “AP” means applied; “APP” means approved; “C” means considered; “D” means distinguished; “DA” means disapproved; “DT” means doubted; “E” means explained; “F” means followed; “O” means overruled)

Thomas Mjengi v Republic [1992] TLR 157

Judgment

MROSO, MUNUO AND NSEKELA JJA: The appellant was convicted by the Regional Magistrate at Vuga, Zanzibar of unlawful possession of a narcotic drug popularly known as “bhang”; contrary to section 17(1) and 32(4) of Act number 6 of 1986, as amended by Act number 6 of 1991 of the Laws of Zanzibar. He was sentenced to 15 years in an education center. His appeal to the High Court of Zanzibar was dismissed, hence his appeal to this Court. In this appeal the appellant was represented by Mr *Patel*, Learned Advocate, and the respondent Government of Zanzibar was represented by Mr *Abdulhakim Ameir*, Learned State Attorney. With the leave of the court, Mr *Patel* filed an amended Memorandum of Appeal.

Mr *Patel* filed four grounds of appeal. The first and second grounds each argued separately while the third and fourth grounds were argued together. In the first ground it is complained that the trial (sic) judge erred in law and in fact in not declaring the proceedings, judgment and conviction by the trial court a nullity for the reason that the trial court did not inform the appellant of his right under section 162 of the Criminal Procedure Decree, (Chapter 14) of the laws, to engage an advocate. The second ground of appeal is divided

into paragraphs (a), (b), (c) and (d). In paragraph (a) the complaint is that the trial magistrate did not “take part in the proceedings” although he knew that the appellant was not represented by an advocate. The complaint in paragraph (b) is that a PC Omar and other independent witnesses were not called by the prosecution and that, therefore, the trial court should have drawn an adverse inference from that failure on the part of the prosecution. In paragraph (c) it is complained that the bhang which was said to have been “planted” on him or could have been tampered with between the time it was alleged to have been found on the appellant and its production in Court. Paragraph (d) appears to have been more of a submission than a ground of appeal. It reads – “the appellant had given a reasonable explanation of innocence in answer to the charge”.

The third ground of appeal says that the “trial” (sic) judge should have held that the trial magistrate was wrong to sentence the appellant to 15 years in an Education Centre, that the sentence was unconstitutional, excessive and degrading. In the fourth ground it is said that the “trial (sic) judge erred in law and facts for not holding as illegal the incarceration of the appellant in the Central Prison whereas, under Act number 1 of 1980, he ought to have been sent to an education centre for correction of his behaviour which centre at any rate, he said, was non-existent in Zanzibar.

The evidence which led to the conviction of the appellant was that on 16 September 1998 seven police constables who included PW2-PC Salum Rashid, PW3 – PC Ali and a PC Omar all from Ng’ambo police station were on patrol at a place known as Nyaruguso. They saw a group of people among whom was the appellant. It was said that the appellant immediately took to flight. He was chased and arrested by the police who had become curious why he had acted so suspiciously. PC Ali searched the appellant and in the front part of his underpants a packet in a blue plastic bag was found. In the bag there were 46 packets wrapped in khaki paper. The packets contained dried leaves which the police suspected to be bhang. The appellant was then taken to Ng’ambo police station and subsequently he was charged in court.

The substances which were said to have been found in the possession of the appellant were on 12 October 1998 sent by PW4 – DC Shamna, to the Government Chemist for analysis to establish what they were. PW1 – Kazija Juma Hassan who worked in the Government Chemist Laboratory as a Government analyst said on 12 October 1998 he received 46 packets which were wrapped in khaki paper and were in a plastic blue bag from a person he called PC Shamhuna with Force number D9193. It is therefore possible PW1 did not get correctly the name of the detective constable who brought the samples. All the 46 packets together weighed 9.1443 grams.

On 28 April 1999 Kazija Hassan issued a Certificate of Analysis regarding the samples he had received from the police. It said that the samples were bhang because they contained what he called “cannabinol”. He sealed the samples and handed them together with the Certificate of Analysis to DC Shamna. Both the samples and the certificate were produced at the trial of the appellant as exhibits.

Before the trial magistrate the appellant gave evidence on oath denying he was ever found in possession of bhang. He had been sitting with colleagues when one out of a group of policemen on patrol picked him and took him to Ng’ambo police station. At the police station police counted 40 packets containing bhang and alleged that they belonged to him (appellant). His protests were not heeded and on the following day he was charged in court with the offence of which he was later convicted.

In his appeal to the High Court his advocate, the same Mr *Patel*, filed 12 grounds of appeal. Some of those grounds contained complaints which are similar to the ones before this Court. For example, there were the complaints that the appellant ought to have been informed of his right under section 162 of the Criminal Procedure Decree to be defended by an advocate and that such a right is also provided in the Zanzibar Constitution; that the trial magistrate “ought to have taken part in the proceedings”, considering that the appellant was undefended. It was also complained that PC Omar ought to have been called as a witness by the prosecution and that the court should draw an adverse inference against the prosecution for the failure to call PC Omar. Alternatively, the court should have acted under section 138(1) of the Criminal Procedure Decree (Chapter 14) to summon that witness. The issue that “the alleged Exhibit Bhang” could have been tampered with, that the appellant had given a reasonable explanation to justify this acquittal and that the sentence which was meted out on the appellant was excessive and unconstitutional were also raised. Finally, it was also complained that there is in fact no “Chuo cha Mafunzo” to which the appellant as a convicted person could have been sent.

The High Court, Dourado J very briefly dealt with the appeal. In a two-page judgment he dismissed the appeal. There was no discussion at all of the merits or otherwise of the grounds of the appeal. The quick conclusion was that the (prosecution) case had been proved beyond a reasonable doubt. Regarding the sentence the Learned Judge of the first appellate court said that it was the minimum under the law and it was not unconstitutional. On the complaint that a “Chuo cha Mafunzo” did not exist, the High Court said:

“Regarding Mr Patel’s submissions that the accused was not sent to prison but to an educational institution, section 32 of Act number 6 of 1991 provides that an accused shall on conviction be sent to an Educational Centre.”

The High Court then as already mentioned dismissed the appeal. Before we discuss the grounds of appeal as presented and argued before us, we wish to observe that in the quotation which we just made above the Learned High Court Judge imputed to Mr *Patel* the exact opposite of what he had submitted before him. Mr *Patel* was not agitating for his client to be sent to prison but to a true Chuo cha Mafunzo, which according to Mr *Patel*, did not exist, and that instead his client had been sent to a prison contrary to law. That was also his complaint before us. Now to the grounds of appeal.

As already pointed out earlier in this judgment the first ground was that the trial was a nullity because the trial court did not inform the appellant of his right to be defended by an advocate.

We think that Mr *Patel* has misconstrued section 162 of the Criminal Procedure Decree. The section reads as follows:

“162 In the absence of any provision in any other law to the contrary, any person accused before any criminal court and against whom proceedings are instituted under this decree in any such court may of right be defended by an advocate.”

In our considered view, the section merely declares the right of a person who is charged in any criminal court to be defended by an advocate where he chooses to have such services. It does not impose an obligation on the court to inform an accused person that he has such right. As was rightly argued by the Learned State Attorney, where the Decree imposes such a duty or obligation on the court it says so explicitly. Examples can be found in sections 175 and 178. In section 175(1) a duty is placed on the court to state the substance of the charge to an accused person and in section 178(1) the court is required again to explain the substance of the charge to the accused person if it finds that a *prima facie* case had been established by the prosecution. The court is also required to inform the accused of his right to give evidence on oath and to call witnesses or other evidence in his defence or give a defence on oath and to call witnesses as well.

Mr *Patel* has contended that the right to be defended by an advocate goes with the right to be informed by the court of that right. He cited the case of *Thomas Mjengi v Republic* [1992] TLR 157 in which Mwalusanya J as he then was, held that the right to legal representation implies the right to be informed of that right and that failure to inform an accused person of that right rendered a trial a nullity. But Judge Mwalusanya was not discussing the right to legal representation in general. He was discussing section 310 of the Criminal Procedure Act, 1985 (Tanzania Mainland) read together with section 3 of the Legal Aid (Criminal Proceedings) Act number 21 of 1969. Section 3 of Act number 21 of 1969 gave power to a certifying authority to direct that free

legal aid be provided to indigent accused persons who face criminal charges in court. Section 310 of the Criminal Procedure Act, 1985 reads:

“310 Any person accused before any criminal court, other than a primary court, may of right be defended by an advocate of the High Court, subject always to the provisions of any rules of court made by the High Court under powers conferred by article 26 of the Tanganyika order in council, 1920.”

By reading section 310 of the Criminal Procedure Act, 1985 together with section 3 of Act number 21 of 1969 the judge was emphasising the right to free legal aid to an indigent accused person. That was why he said of Mr Kifunda, a State Attorney who represented the Republic on the *Mjengi* case:

“Counsel for the Republic Mr *Kifunda* was candid enough to concede that a *poor accused person* has a statutory right to be provided with *free legal aid* and to be informed of that right by the court. He said that right stems from the purposeful construction of section 310 of the Criminal Procedure Act as read in the light of section 3 of the Act number 21 of 1969.”[Emphasis mine]

So, in the *Mjengi* case the High Court had in mind indigent appellants and, in fact, acting under section 3 of the Legal Aid (Criminal Proceedings) Act number 21 of 1969 the judge assigned an advocate to provide the appellant before him free legal services in prosecuting their appeal. To conclude his argument on the need for free legal aid to poor accused persons, the Judge said:

“That is why I held that the statutory right to legal representation is contained in section 310 of the Criminal Procedure Act number 9 of 1985 as interpreted in the light of international human rights stands (sic) and norms as above adumbrated. In short section 310 of the Criminal Procedure Act should be interpreted to mean that those who can afford to pay have a right to legal representation; and those who cannot afford to pay (that is who are poor) have an equal right to free legal aid paid for by the state, as provided in the Legal Aid (Criminal Proceedings) Act number 21 of 1969. That right includes the right to be informed of that right by the trial court.”

We understand Judge Mwalusanya to be saying that the poor who are entitled to free legal aid should be informed by the court that they have such a right.

The appellant in this appeal did not claim to be indigent and, therefore, in need of free legal aid. In fact he engaged an advocate in both the High Court and in this Court. We do not think, therefore, that the omission by the trial court to inform him that he had a right to engage an advocate, if he wanted to, had the effect of nullifying the whole trial. We dismiss that ground of appeal.

Regarding the second ground of appeal we are satisfied that the trial court observed the statutory requirements in the conduct of the trial. We could not find any indications that the trial magistrate failed to provide necessary protection to the appellant in the course of the trial as to deserve censure. We would at any rate agree with Mr *Patel* that, as a general proposition, a judge or magistrate must not preside on a trial like a football match referee but must ensure that an unrepresented party is not bullied by an advocate for the other party and that he is guided by the court to present his case as fully as possible, without the court appearing to lose its impartiality.

We find the complaint that one PC Omar should have been called by the prosecution unnecessary. The policeman was mentioned as simply one of the seven police officers who were on patrol when the appellant was arrested. There is no particular reason why the prosecution should have called him as their witness if they felt that he would not add any material evidence to their case. Nor do we think that there was reason for the trial court to call him as a court witness. The appellant did not intimate to the court that PC Omar should be called as a witness.

Mr *Patel* argued at some length that there was a possibility that the contents of the 46 packets which were found by the government chemist to be bhang could have been tampered with between the time they were said to have been found on the appellant and when they were tendered in court as exhibits.

Really the time between the analysis by the government chemist and the production of the packets as exhibits in court is not all that important when the question of tampering is considered. The really crucial time was between the seizure of the packets by the police at Nyaruguso and the analysis of the contents by PW1-Kazija Hassan. If there was tampering during that period then PW1 may have analysed something other than what was found on the appellant. There is need therefore to follow carefully the handling of what was seized from the appellant up to the time of analysis by the government chemist of what was believed to have been found on the appellant.

Both PW2-PC Salum Rashid and PW3-PC Ali said that when the 46 packets in khaki wrappers were opened they were found to contain dried leaves which they believed were bhang. From that evidence it is obvious that the packets could be easily opened for the contents to be exposed. When the packets in the blue plastic bag were taken to the police station the evidence is silent on who received them and, whoever received them, what he did with them, or where he kept them. So, for thirteen days up to 29 September 1998 when PW4-DC Shamna was instructed to investigate the case nothing is known about the condition of the packets. PW4 was given by an undisclosed clerk what he called "the exhibit of this case" and at an unknown time and

date he sealed it and sent it to the government chemist, PW1-Kazija Hassan, on 12 October 1998. This was a period of twenty six (26) days after 46 packets of suspected bhang were found on the appellant.

PW1 said the packets weighed 9.1443 grams but it is not known what the 46 packets seized from the appellant weighed. What is being said here is that there is no assurance that the substances which were found on the appellant were the same ones which PW4-DC Shamna was handed by the anonymous clerk on 29 September 1998 and which he sealed on an undisclosed date between 29 September and 12 October 1998 when he took them to PW1-Kazija Hassan. The possibility that there may have been tampering with the contents of the 46 khaki packets when they were lying at Ng'ambo police station cannot be ruled out. Mr *Patel*, therefore, cannot be said to be raising baseless concerns when he raised the issue that there may have been tampering with what was said to have been seized from the appellant.

Even after samples were received in the Government Laboratory a period of over six months elapsed before PW1 could issue the certificate of analysis to the effect that the packets contained bhang. It is not certain if the analysis was done soon after the packets were received from DC Shamna or whether it was done on 28 April 1999 when the certificate was issued. The chances of tampering in the Government Laboratory before analysis was done is also not eliminated.

We think the vital missing link in the handing of the samples from the time they were taken to the police station to the time of chemical analysis has created a real doubt if the prosecution proved its case against the appellant to the required standard.

Unfortunately, the High Court, as a first appellate court, did not subject the evidence to critical evaluation. Had it done so it would have come to the obvious conclusion that a reasonable doubt existed and that the appellant was to be given the benefit of that doubt. The result would have been to allow the appeal.

In view of the conclusion we have reached it is unnecessary of us to discuss whether the sentence of 15 years, which was the statutory minimum, if the conviction were sound, was unconstitutional. We also observe that ground 4 in the memorandum of appeal was in any case unnecessary because the trial magistrate sentenced the appellant to be sent to one of what are known as education centres, required by law. If we had upheld the conviction we would not criticize the trial magistrate for sentencing the appellant as he did. Whether those education centres are in truth not educational but are penal prisons as contended by Mr *Patel*,

cannot be blamed on the trial court. If it is in fact an issue as to what in reality those institutions are, then it should be directed to the appropriate authorities for remedial legal or administrative action.

It should now be clear that the appeal must be allowed. The decisions of the two lower courts are quashed, the conviction and sentence of fifteen years in an Education Centre are set aside. The appellant is to be set free forthwith unless he is being held for some other lawful cause.

For the appellant:

Mr Patel

For the respondent:

Mr A Ameir

MADHWA AND OTHERS V CITY COUNCIL OF NAIROBI

NO. 1208 OF 1967; [1967] LLR 5986 (HCK)

[1] *Constitutional law – fundamental rights and freedoms – Whether fundamental rights and freedoms of non-citizens guaranteed under the Constitution of Kenya – Whether eviction of non-citizens from market stalls under the policy of Africanization unconstitutional.*

Editors Summary

The six plaintiffs were the holders of stalls in the municipal market on monthly terms from the defendant council. All of them were Asians and citizens of the United Kingdom and Colonies. None were citizens of Kenya. Four of them, however, having been born in Kenya, had applied before 12 December 1965 for registration as citizens of Kenya under section 2(1) of the Kenya Constitution, but their applications were still pending. The Council's Social Services and Housing Committee resolved to "Africanise" the market by evicting non-Africans from it in favour of Africans. This resolution was ratified by the Council confirmed that it was its policy to allocate the stall to "Kenya Citizens of African origin". The plaintiffs then brought this action for declarations (*inter alia*) that the resolution was discriminatory and that the notices to quit were void. The four plaintiffs who had applied for registration as citizens and should be treated as citizens for the purpose of the suit.

Held - The plaintiffs, notwithstanding that they were citizens of the United Kingdom and Colonies and were not citizens of Kenya, were entitled under section 28(i) of the Constitution to come to the court without relying upon or being limited by the provisions of section 10 thereof; and were to be regarded as "persons" within the meaning of section 26(2).

The resolution complained of was "discriminatory" within the meaning of section 26(2) of the Constitution by reason of the preference shown in favour of those persons who in the resolution were termed "Africans" and the giving of the notices to quit in pursuance of the resolution constituted treating the plaintiffs in a discriminatory manner contrary to section 26(2).

Observation (I) the notices were void and ineffective.

No cases referred to in judgment

Judgment

HARRIS J: This is an action brought by the holders, as monthly tenants, of some stalls in the municipal market in Muindi Mbingu Street in the City of

Nairobi who, having been served by the defendant Council with notices to quit, seek to have the notices declared void as conflicting with certain provisions of the Constitution, the defendant restrained from evicting the plaintiffs, and other relief.

To facts of the case may be shortly stated. On 7 November 1966 a committee of the defendant Council known as the Social Services and Housing Committee passed a resolution in the following terms:

“Africanization of Commerce: Municipal Markets.

Resolved:

- (i) That the Director of Social Services and Housing be congratulated on the manner in which he has conducted this matter with the Ministry of Local Government and that his views be endorsed by this committee.
- (ii) That this committee reiterates the Council’s policy of Africanization of commerce in accordance with the Government’s policy as evidenced by various resolutions of this Council.
- (iii) That, so as to accelerate the Africanization of the City Market, the present stand-holders who are non-Africans be given three months’ notice to terminate their tenancies with this Council and that the officers be authorised to invite applications from suitable Africans for the tenancies of such stalls.
- (iv) That an application be sent to the appropriate Ministry through the Ministry of Local Government for a loan of £20 000 to be used by Council in assisting the African traders who will be allocated the stalls mentioned in paragraph (iii).”

It was common case that this resolution was ratified at a meeting of the defendant Council on 6 December 1966 and the hearing preceded on the footing that the resolution had become that of the defendant.

The first two plaintiffs are the tenants respectively of stalls number 10 and 11 in the market, where they carry on their separate businesses and the remaining plaintiffs are tenants of stall number 45 where they are jointly carrying on business. All the plaintiffs are Asians by race and citizens of the United Kingdom and Colonies and none of them is a citizen of Kenya. Each of the first four was born in Nairobi and, none of their parents having been born in Kenya; they had applied prior to 12 December 1965 for registration as citizens of Kenya under section 2(1) of the Constitution and are still awaiting the results of their applications.

By letters dated 1 August 1967 addressed to and served upon the plaintiffs, the defendant required them to quit and deliver up possession of their respective stalls on or before 31 October 1967 On 5 September 1967 Messrs

Waruhiu and Company, the plaintiffs' advocates, wrote to the defendant to seek verification of a rumour that its policy was to lease the stalls to persons who were citizens of Kenya of African origin, and by letters dated 8 September and 11 October the defendant confirmed that it was its policy that the stalls be allocated to "Kenya citizens of African origin" and that the notices to quit had been served under the terms of the resolution set out above.

Consequent upon this correspondence the present action was filed. In their plaint the plaintiffs contend that the notices to quit were given by the defendant in the performance of its functions as a public authority purportedly acting under the powers conferred upon it by the Local Government Regulations 1963, and in pursuance of the policy and implementation of the resolution above mentioned, that both the policy and the resolution violate the provisions of sections 14 and 26(2) of the Constitution of Kenya, and that their implementation as against the plaintiffs would amount to unlawful discrimination and an infringement of the plaintiffs' constitutional rights. In the prayer to their plaint they seek declarations to the effect that the said policy and resolution are unlawful, that their implementation would be unlawful, and that the notices to quit are void, together with orders restraining the defendant from evicting them severally from the premises in pursuance of the said or any similar policy or resolution.

Before considering the main issues in the case it is necessary to deal with a preliminary proposition put forward by counsel for the plaintiffs.

Section 1(1) of the Constitution declares that:

"Every person who, having been born in Kenya, 11 December 1963 a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Kenya on 12 December 1963:

Provided that a person shall not become a citizen of Kenya by virtue of this sub-section if neither of his parents was born in Kenya."

Section 2(1) provides that:

"Any person who, but for the proviso to sub-section (1) of section 1 of this Constitution, would be a citizen of Kenya by virtue of that sub-section shall be entitled, upon making application before the specified date in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of Kenya."

The specified date referred to in section 2(1) was, by virtue of section 2(6)(a), 12 December 1965 and it was established on the evidence of an officer in charge of citizenship in the immigration department of the Government that a very large number of applications for citizenship had been received immediately before that date of which some thousands, including those of the

first four plaintiffs, were still to be dealt with. Relying upon the foregoing facts and the provisions of section 2(1) counsel contended that each of the first four plaintiffs had in law an absolute right by reason of his birth to be registered as a citizen and could not legally be refused, and that therefore each of the four should be treated for the purpose of this suit as if he had become and were now a citizen by registration. In support of his contention he contrasted the provisions of section 2(1) with those of section 6(1) which, as originally framed, conferred upon citizens of certain other countries who fulfil the prescribed requirements, a right to be registered as citizens of this country, but which has since been amended to reduce that right to mere eligibility for such registration in the discretion of the appropriate minister.

If this were a suit instituted by the Government against persons in a position similar to that of these four plaintiffs and depending for its success upon the might be that a defence in the nature of some form of estoppel, based upon the provisions of section 2(1) and the delay which has occurred in dealing with the applications, could be raised with a possibility of success. In the present case, however, the defendant is not the authority charged with issuing the certificates and is in no way responsible for the delay which has ensued and in my opinion all six plaintiffs must be treated alike as being what in fact they are, namely, persons who are not citizens of this country but who were on 11 December 1963 and still are citizens of the United Kingdom and Colonies. For reasons which will appear later it is, in my view, immaterial for the purpose of this suit whether or not they are citizens of Kenya.

Turning now to the main question in the case the following specific issues arise for determination:

- (1) Were the notices to quit given by the defendant acting by virtue of any written law or in the performance of the functions of any public office or any public authority within the meaning of section 26(2) of the Constitution?
- (2) Do the plaintiffs or does any of them fall within the protective provisions of the said section?
- (3) Did the action of the defendant in giving notice to the plaintiffs to quit the market stalls pursuant to the said resolution constitute treating the plaintiffs or any of them in a discriminatory manner contrary to the provisions of the said section?
- (4) Did the notices to quit effectively terminate the tenancies in the market stalls of the respective plaintiffs or of any of them?

Originally introduced as a schedule to the Kenya Independence Order in Council 1963, the Constitution has been substantially refashioned by the legislature of this country and, in its present form, may be said to represent the

written expression of the majority will of the entire adult population. It declares and defines the basic rights, freedoms and safeguards upon which the application of the rule of law in this State is founded and by means of which it is secured. It binds and, in turn, benefits, to the extent accorded by its provisions, all persons within the realm. It is susceptible of amendment by Parliament but nevertheless it takes precedence over all other legislative enactments. In the present action the plaintiffs assert that the defendant, by its conduct, has committed a breach of section 14 and 26(2) of the Constitution and they invoke the aid and protection of the High Court. Their right so to do is itself assured by section 28(1) and it therefore becomes the duty of the court to examine their claim and, if the breach so complained of the established, to lend that aid and protection, so far as may be appropriate.

The Constitution is divided into a number of chapters and schedules, the former being sub-divided into sections. Chapter II, which comprises sections 14 to 28, is entitled “Protection of Fundamental Rights and Freedoms of the Individual” and its primary scope and application are indicated by section 14, which is as follows:

“Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:

- (a) Life, liberty, security of the person and the protection of the law;
- (b) Freedom of conscience, of expression and of assembly and association; and
- (c) Protection for the privacy of his home and other property and from deprivation of property without compensation,

The provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms of others or the public interest.”

It is to be observed that this section is declaratory of the rights of the individual as a human person without reference to any matter of nationality, citizenship or domicile but, as will be seen, among the limitations referred to in the section are certain restrictions to be found in section 26 with respect to persons who are not citizens of Kenya. The material provisions of section 26 are as follows:

- “(1) Subject to the provisions of sub-sections (4), (5) and (8) of this section, no law shall make any provision that is discriminatory either or itself or in its effect.

- (2) Subject to the provisions of sub-sections (6), (8) and (9) of this section, no persons shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
- (3) In this section, the expression ‘discriminatory’ means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
- (4) Sub-section (1) of this section shall not apply to any law so far as that law makes provision:
 - (a) With respect to persons who are not citizens of Kenya:
 - (b), (c), (d) ...
- (5) Sub-section (2) of this section shall not apply to:
 - (a) anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in sub-section (4) of this section.
 - (b) ...”

Sub-sections (5), (8) and (9), although referred to in sub-sections (1) and (2), do not appear to have any direct bearing upon the present case and it is not necessary to set out their terms.

The provisions upon which the plaintiffs principally rely are those contained in sections 14 and 26(2) and the first issue is as to whether the defendant, in giving the notices to quit, was acting “by virtue of any written law or in the performance of the functions of any public office or any public authority” within the meaning of section 26(2). I am satisfied that the defendant, in granting to the plaintiffs their present tenancies in the market premises, was acting by virtue of its powers under the Local Government Regulations 1963, or the relevant legislation which was replaced by these Regulations, and I am also satisfied that the defendant is a public authority. Counsel for the defendant contended, however, that in giving the notices to quit, the defendant was acting, not in the manner referred to in section 26(2), but purely as a landlord and therefore was not brought within the ambit of the sub-section. He argued that, although it was a function of the defendant under the Regulations of 1963 to provide, maintain and let city markets, the giving to one of its tenants in such a market of a notice to quit was nothing more

than the exercise of a right incident to the position of a landlord irrespective of any other powers or functions attaching to it.

This, it seems to me, is an over-simplification. There can be no doubt that, having created as between itself and the plaintiffs the relationship of landlord and tenant, the defendant equally with the plaintiffs, became entitled to enjoy, subject to any particular limitations applicable by reason of it being a local authority, the usual rights of landlord and tenant respectively appropriate to the tenancies so created and that these rights included, on the part of the defendant, the right to terminate each of the tenancies by due service of a proper notice to quit. When a lesser is a private person who has made a letting of property to which he is beneficially entitled it may well be said that the only legal considerations to be borne in mind in considering his activities connected with the letting are those flowing from his position of landlord, and that the only branch of law primarily relevant to those activities is the law of landlord and tenant. If, however, instead of being beneficially entitled he were a trustee of the property his power of so dealing with it would be limited by the terms of the trust, either to be gathered from the instrument creating it or to be found endowed with the power to grant leases he cannot do so. Likewise, in the case of a statutory body, unless it be invested with leasing powers it cannot lawfully grant leases and if it be so invested it can grant leases only to the extent and for the purpose authorised by those powers. These considerations apply generally to the exercise of leasing powers by limited owners and statutory bodies and, no doubt, in each case a power to grant leases includes by implication a power to terminate them for such a power is inherent in the relationship so created, but in my opinion the exercise of that power consequent upon the granting of a lease under statutory or other special authority cannot properly be divorced from that authority and regarded as arising merely from the law of landlord and tenant. Being itself a creature of statute such a body can have no existence apart from the statutory provision which creates it, and if can lawfully execute and perform. Thus if, in the course of its operations, it should buy or sell goods, employ labour, or lease its premises, it no doubt brings itself within the purview of the law relating to the sale of goods, master and servant, and landlord and tenant respectively, but this extension of its juridical activities in no way takes it outside the operation of the field of law to which, as a creature of statute, it is inherently subject.

For the reasons which I have indicated I am satisfied that the defendant, in giving notice to the plaintiffs to vacate the market stalls, came within the ambit of the description "any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority" as used in section 26(2) and that the first of the issues set out above must be answered in the affirmative.

In regard to the second issue the defendant did not seek to rely upon section 26(6) and I shall consider this issue in the first place without regard to that sub-section. The plaintiffs' contention is that they come within the term "persons" in section 26(2), while the defendant maintains that, being citizens of the United Kingdom and Colonies, they fall within the provisions of section 10 of the Constitution in addition to those of section 26, with the result, it is said that their rights under the latter section are restricted accordingly. Section 10(1) provides *inter alia* that a citizen of United Kingdom and Colonies shall enjoy the same rights and privileges (being rights and privileges which under Kenya law are enjoyed by citizens of Kenya) as a citizen of Kenya enjoys "under the Constitution of the country concerned", that is, the United Kingdom and Colonies, "or under any other law in force in that country". One result of this the defendant submits, is to deprive the plaintiffs of their right of action for the reason that, under the law of the United Kingdom, the present suit would be unsustainable. A second result, it is argued, is to attract the operation of sub-section (4) of section 26, which in turn, would render the provisions of sub-section (1) inapplicable. It is necessary to examine these contentions with care.

Section 10 falls within Chapter 1 of the Constitution which relates only to citizenship, and there can be no justification for so reading that chapter as to deprive Chapter II of its quality of being, as it is clearly intended to be, a comprehensive statement of the fundamental rights and freedoms of the individual. In my opinion, the plaintiffs, notwithstanding that they are citizens of the United Kingdom and Colonies and are not citizens of this country, are entitled under section 28(1) to come to this court for the enforcement of their rights under section 26(2) without relying upon or being limited by the provisions of section 10. If I am correct in this it follows that the court is relieved of the somewhat difficult task of attempting to construe the terms of section 10(1) and to apply them to the circumstances of this case. Furthermore, I can see nothing in section 10(1) to attract the application of section 26(4) but even if there were, the ultimate result would be merely to exclude from this case the operation of section 26(1) upon which, however, the plaintiffs do not seek to rely. The plaintiffs' claim to come within the term "persons" as used in section 26(2), on the other hand, is supported, not only by the language of section 14, but also by the provisions of the first schedule to the Constitution of Kenya (Amendment) Act 1965, which amends section 25(1) by substituting for the word "person" the words "citizen of Kenya", while leaving unamended the words "person" and "persons" whosoever else they occur in Chapter II, thereby implying that those words, when used in that chapter, do not necessarily import citizenship.

For these reasons I am satisfied that, whatever be the effect of section 10(1), the plaintiffs are to be regarded as "persons" within the meaning of

section 26(2) and that the second issue must also be answered in the affirmative.

With respect to the third issue, the defendant submits that what it has done in regard to the plaintiffs does not amount to treating them “in a discriminatory manner” within the contemplation of section 26(2). Seeking to construe the resolution in the light of the definition of the term “discriminatory” in sub-sections (3) of the section, counsel for the defendant in his able argument contended that the term “African” does not mean a member of an indigenous African race or a person who was or whose forefathers were born in Africa but that logically it should be taken to mean a citizen of any country on the continent of Africa extending from and including Algeria in the north to the Republic of South Africa in the south and without regard to race, colour or place of origin, and that the cognate expression “Africanization” should be construed accordingly and so as not to be confused with what is sometimes called “Kenyanization”. In support of this proposition he referred to the definition of the word “African” to be found in the (3 ed), reprinted and published in the year 1965, of the work known as “*The Shorter Oxford English Dictionary on Historical Principles*”, at page 33, reading “belonging to or characteristic of, a native or inhabitant of, Africa”. He sought to distinguish the definition in section 5(1) of the Interpretation and General Provisions Act (Chapter 2) on the ground that the object of that provision was to give the term a restricted meaning for the purpose only of written laws, and he invited comparison with the use of the expression “South American” to designate a citizen of any of the several states in that continent.

The contention that the term “African” should be taken to mean a citizen of any country on the continent of Africa is at variance with the pattern of section 6. By sub-section (1) of that section it is declared that any person who is either a Commonwealth citizen or a citizen of any country in Africa to which the sub-section applies and who has been ordinarily resident in Kenya for such period and under such authority as may be prescribed by law may, in the discretion of the appropriate minister be granted citizenship of Kenya. By sub-section (3) it is provided that the countries in Africa to which sub-sections (1) applies (apart from those falling within section 9) are such countries as are for the time being declared by the Minister to be countries affording reciprocal rights to Kenya citizens. It is clear, therefore, that the provisions of section 6 do not extend, automatically, to the citizens of every country on the continent of Africa but are limited to the citizens of such of those countries as either come within section 9 or for the time being come within section 6(3). Although this factor does not control the meaning of the words used in the resolution, it is perhaps not without some significance as a criterion of the correctness of the interpretation of the resolution suggested by counsel for the defendant.

The contention that the term “African” should be taken to mean a citizen of any country on the continent of Africa is at variance with the pattern of section 6. By sub-section (1) of that section it is declared that any person who is either a Commonwealth citizen or a citizen of any country in Africa to which the sub-section applies and who has been ordinarily resident in Kenya for such period and under such authority as may be prescribed by law may, in the discretion of the appropriate minister, be granted citizenship of Kenya. By sub-section (3) it is provided that the countries in Africa to which sub-section (1) applies (apart from those falling within section (9) are such countries as are for the time being declared by the Minister to be countries affording reciprocal rights to Kenya citizens. It is clear, therefore, that the provisions of section 6 do not extend, automatically, to the citizens of every country on the continent of Africa but are limited to the citizens of such of those countries as either come within section 9 or for the time being come within section 6(3). Although this factor does not control the meaning of the words used in the resolution, it is perhaps not without some significance as a criterion of the correctness of the interpretation of the resolution suggested by counsel for the defendant.

Even if the defendant’s construction be correct, which is very doubtful, the resolution nevertheless would appear clearly to fall within the definition of “discriminatory” in section 26(3) by reason of the preference shown in favour of those persons who in the resolution are termed “Africans” whatever that word may mean, as against these other persons who are termed “non-Africans”. This conclusion gains support from the correspondence with Messrs Waruhiu and Company already mentioned, in which the defendant, in response to an inquiry as to this very matter, stated that its policy was that “the stalls in this market be allocated to Kenya citizens of African origin”, thereby importing in respect of its policy an enhanced element of discrimination in favour of persons who come within the description of “Kenya citizen of African origin” as against those who do not.

Although not relied upon by the defendant, there might at first appear to be an answer to the plaintiffs’ claim in sub-section (6) of section 26 which, by paragraph (a), excludes the application of sub-section (2) to anything expressly or by necessary implication authorized to be done by any such provision of law as is referred to in sub-section (4) set out above. The effect of this paragraph, read together with paragraph (a) of sub-section (4), would appear to be that no law can be invalidated under section 26(1) so far as it makes provision with respect to persons who are not citizens of Kenya, and that no act or thing can be invalidated under section 26(2) if it was Kenya, and that no act or thing can be invalidated under section 26(2) if it was expressly or by necessary application authorised to be done by any such statutory provision. If, therefore, the acts of the defendant which the plaintiffs seek to impugn had

been authorised by a statutory provision having specific application to non-citizens as distinct from citizens they would not have been open to challenge under section 26. No evidence was adduced, however, upon which it would be possible to bring the defendant's acts within the protection of sub-section (6) of that section nor did the defendant seek in argument to place reliance upon it.

It is not disputed that the notices to quit were given in pursuance and implementation of the resolution, with the result that the giving of the notices constituted treating the plaintiffs and each of them in a discriminatory manner contrary to the provisions of section 26(2). The third issue must therefore be answered in the affirmative.

Turning to the fourth issue, it is clear that a notice to quit given or any other overt act done in implementation of a resolution the passing of which was in conflict with the Constitution, is ipso facto void, and accordingly the notices given in the present case were void in law and ineffective to terminate the tenancies of the plaintiffs, or of any of them, in the market stalls. The fourth issue must therefore be answered in the negative.

For the reasons which I have stated I am of the opinion that the action succeeds and it now becomes necessary to consider the relief to which the plaintiffs are entitled.

It is manifest that the apparent purpose of the resolution, unsupported, as it is, by any statutory provision coming within section 26(4)(a) to some extent inconsistent with the intention of section 26(2) of the Constitution, and on this footing the plaintiffs seek an order declaring that the resolution, together with the policy that inspired it, is unlawful. Apart from the procedural steps involved, the formulation of a policy and the passing of a resolution, as distinct from the implementation of the one or of the other, are primarily intellectual or mental exercises rather than physical or overt acts and it is not clear that *prima facie* either could be said strictly to be unlawful *per se* by virtue of section 26(2), designed, as it is, to prohibit the actual "treatment" of any person in a discriminatory manner. Indeed, in the realm of criminal jurisprudence it is the accepted position that in principle an intent, as distinct from an attempt, to do an act which, if done, may be unlawful is not *per se* unlawful unless the law specifically so provides or requires. This aspect of the matter, which in the present case is largely academic, was not canvassed by counsel during the hearing and, there being no suggestion of a procedural irregularity relating to the formulation of the policy or to the passing of the resolution, I am not prepared, in the absence of any persuasive authority, to declare that either the policy or the resolution, although capable of being implemented in an unlawful manner, was in itself unlawful.

Having regard to my findings generally, however, and to the circumstances of the case as a whole, I am satisfied that the plaintiffs are entitled to declarations to the effect that any acts done or to be done by the defendant by way of implementation of the resolution already mentioned are or would be, ask against the plaintiffs and each of them, contrary to the provisions of section 26(2) and therefore unlawful and, as a corollary, that the notices to quit given by the defendant to the plaintiffs are void. There will be an order accordingly. In addition, it is reasonable that the plaintiffs and each of them should be protected from further disturbance in purported pursuance either of the resolution referred to or of the notices to quit already given and there will be an order restraining the defendant in that behalf. There will be liberty to each party to apply should any difficulty arise in working out the terms of these orders.

The plaintiffs also seek what in effect would be an order to restrain the defendant from evicting them from their stalls in pursuance of any notices to quit or other process that might be given or taken hereafter in implementation or pursuance of any future policy or resolution similar to those referred to and not saved from invalidation by section 26(6)(a). It has not been shown or suggested that the defendant, in pursuing the course which it has followed, had any intention of deliberately adopting a policy or passing a resolution which would or might conflict with the provisions of the Constitution, or that there is any reason to suppose that it would seek to do so in the future, and I am not satisfied that it would be proper to grant the further relief so sought.

For the appellant:

Mr JA Mackie-Robertson and Menezes

For the respondent:

Mr PA Clarke

MAZRUI V REPUBLIC

NO. 81, 82 AND 83 OF 1985; [1985] LLR 5978 (HCK)

[1] *Constitutional Law – Fundamental Rights and Freedoms – Rights to liberty – Whether right to bail pending trial is absolute – Limitations to Fundamental rights and freedoms.*

Editor's Summary

The three applicants were charged with taking part in unlawful assembly contrary to Public Order Act. They pleaded not guilty and applied for bail twice which applications were denied.

They have now appealed against the decision.

Held - The provisions of the Constitution do not provide that the right to bail pending trial is absolute.

The right to liberty is a fundamental right and freedom as set out in section 70 of the Constitution. It is however not absolute and subject to rights and freedoms of others and of public interest.

Fundamental rights and freedoms are subject to limitations set out in sections 71 – 83 of the Constitution which are designed to ensure that the enjoyment of those rights and freedoms by individuals does not prejudice the rights and freedoms of others.

Appeal and bail application disallowed.

Cases referred to in judgment

(“A” means adopted; “AL” means allowed; “AP” means applied; “APP” means approved; “C” means considered; “D” means distinguished; “DA” means disapproved; “DT” means doubted; “E” means explained; “F” means followed; “O” means overruled)

East Africa

Mutunga v Republic miscellaneous criminal application number 101 of 1982 (UR)

Nganga v Republic; [1985] KLR 451

Opinder Singh Haul v R miscellaneous criminal application number 178 of 1981 (UR)

Rahim Obedi v Republic [1977] ZLR 119

United States

Frimble v Stone

Judgment

ABDULLAH J: The three consolidated applications are for bail pending trial in accordance with section 123(3) of the Criminal Procedure Code which reads:

“The High Court may, save where a person is accused of murder, treason, robbery with violence or attempted robbery with violence direct that a person is admitted to bail or that bail required by a subordinate court or police officer be reduced.”

The applicants were arrested together with two others on 10 February 1985 and appeared before the learned Chief Magistrate’s Court on 14 February 1985. They were then unrepresented.

The three applicants were charged with (1) taking part in unlawful assembly contrary to section 5(11)(c)(i) of the Public Order Act, Chapter 56 Laws of Kenya as read with section 5(11)(c)(ii) of the said Act and (2) failing to comply with an order issued by a police officer contrary to section 5(1)(a) of the said Public Order Act as read with section 5(11)(c)(ii) of the same Act. According to Mr *Chunga*, the Assistant Deputy Public Prosecutor, both the offences are felonies and are punishable with an imprisonment of not less than three years. Be that as it may, neither of the offences is expected from section 123(3) of the Criminal Procedure Code and the High Court has discretion to grant bail. There is no dispute on that score.

After the accused persons pleaded not guilty to various charges, the case was set down for mention after two weeks, at the request of Mr *Chunga*, who appeared before the learned Chief Magistrate on behalf of the Republic and all the accused persons were ordered to be remanded in Kamiti Prison.

On 19 February 1985 applications for bail on behalf of the first applicant (Mohamed Khamis Mazrui) and the third applicant (Evans Motende Getonga) were made by Mr Wetangula for the first applicant and Mr Adala for the third applicant. It was opposed by Mr *Chunga* for the Republic and the Learned Chief Magistrate ruled against the applicants.

Another attempt for bail was made on 28 February 1985 when the case was mentioned before the learned Chief Magistrate and the case was set down for hearing before a Senior Resident Magistrate starting from 11 to 15 March 1985. This time, Mr *Ombete* for the second applicant (Patrick Litunya Lumumba) joined forces with Mr Wetangula and Mr Adallsa. Again bail was opposed by Mr *Chunga*. Once again, in a considered ruling the learned Chief Magistrate, found that there were no new matters to differ from his earlier discretion to grant bail.

The applicants have now come to the High Court to seek directions that each of them be admitted to bail.

The first applicant, Mohammed Khamis Mazrui, is 23 years old and a third year art student at the University of Nairobi. The second applicant, Patrick Litunya Lumumba, is 22 years old and a second year medical student at the University. The third applicant, Evans Motende Getonga, is 22 years old and a second year law student at the University. All are citizens, on the threshold of various professional careers, with everything in stake in Kenya. Each of them is ready and willing to get any reasonable sureties and comply with any reasonable conditions or restrictions that may be imposed by the Court.

Mr *Wetangula*, who appeared for the first applicant in the proceedings, commenced the arguments which were adopted by both Mr *Ombete* for the second applicant and Mr O’Nyamwamu for the third applicant.

Mr *Wetangula* commenced by criticizing the various passages in the two rulings of the learned Chief Magistrate and as rightly pointed out by Mr *Chunga*. The present proceedings were not on appeal from the rulings of the learned Chief Magistrate but Independent applications under section 123(3) of the Criminal Procedure Code. Nevertheless, it may be borne in mind that this Court, in considering the applications for bail may in as far as the circumstances so necessitate, look at the rulings of the Chief Magistrate, to enable it draw its own conclusions with regard to the question of bail.

The main thrust of the argument for bail was that it is a constitutional right and quoting from an American case, *Frimble v Stone*, it was contended that “The right to bail pending trial is absolute”. A Zanzibar case of *Rahim Obedi v Republic* [1977] ZLR page 119 went so far to say that:

“The only ground for refusal of bail is the ability of the accused person to abscond from Court’s jurisdiction when he is required.”

Not being aware of the constitutional and statutory provisions with regard to those prevailing in the USA and Zanzibar, all that I would say is that neither the provisions or the Constitution, the Criminal Procedure Code, nor of practice and precedents of courts in Kenya are in accord with the absolute right to bail in America or the ability to abscond criterion in Zanzibar. Suffice it to say that all the counsel were in agreement with the propositions laid down by Chesoni J (as he then was) in *George Kamau Nga’nga’ v Republic* miscellaneous criminal application number 61 of 1981, that

“Even without the constitutional provisions (section 72(5)) generally in principle and because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail, unless it is shown by the prosecution that there are substantial grounds for believing that:

- (a) The accused will fail to turn up at his trial or to surrender to custody; or
- (b) The accused may commit further offences; or
- (c) He will obstruct the course of justice.”

It may be mentioned that in the *Kamau's* case (*supra*) and in *Opinder Singh Haul v Republic* miscellaneous criminal application number 178 of 1981, the essential criterion for consideration of bail was whether the accused may fail to turn up at his trial.

In the instant case, it is contended on behalf of the applicants, that there is nothing to show that the applicants, if released on bail, will abscond or fail to turn up at their trial: Indeed, the learned Chief Magistrate was of the opinion that:

“There was nothing to show that the accused would not turn up if allowed bail. This is mere apprehension.”

It was argued on behalf of the applicants, that they being at various stages of their academic careers, they have everything to lose by absconding than attending trial. The fact that the appellant would lose more by absconding was a relevant factor in favour of granting bail.

In opposing bail, Mr *Chunga's* main objections were whether arising from the circumstances and incident at the University leading to the present charges against the accused persons, it was in the public interest to release them on bail (see *Willy Mutunga v Republic* miscellaneous criminal application number 101 of 1982) and if so released whether the applicants were likely to abscond and fail to turn up for trial.

In order to comprehend fully the thrust of Mr *Chunga's* objections, it may be relevant to set out the circumstances, which in the opinion of prosecution were so serious as to justify refusal of bail.

On 5 February 1985, the University announced expulsion of three students from the University and suspension of scholarship of five students. It is submitted that such orders for expulsion and suspension were defied by boycott of lectures by the entire student body in sympathy with the affected students. There were repeated appeals by the University Great Court without lawful authority. Such situation continued for 6 days until 10 February 1985 when the students held an unlawful gathering at the University Sports Ground and were addressed by student leaders. At this gathering, the police informed the students that they had unlawfully gathered and that they should disperse. However, the students ignored the directions of the police. The police moved in to disperse the gathering, which resulted in injuries suffered by both police

and the students, one of whom subsequently died. The applicants were arrested arising out of that incident.

It is Mr *Chunga*'s submission that these are matters which cannot be downplayed and are of such grave consequences and show such disregard for law and order, public security and peace, that coupled with the prosecution's apprehensions that the applicants may not turn up for trial, the Court should refuse bail.

However, the counsel for the applicants submit that the gathering where the incidents took place was confined to the students, that events are of the past, that the University having been closed and students having dispersed to various parts of the country where they are required to report to local administration, it is practically impossible for a similar gathering to be convened that would likely cause breakdown of law and order or prejudice public peace, tranquillity and security. It would seem that the counsel for the applicants recognize that the crucial assembly was such that a breakdown of law and order was precipitated though confined to student community. The student community is as much part of the citizenship of this country as are other citizens and the fact that the incident was confined to student community. The student community is as much part of the citizenship of this country as are other citizens and the fact that the incident was confined to the student community cannot minimize the impact of the breakdown of the situation of law and order.

Time and again, advocates come to the courts and propound that:

"Bail is a constitutional right; it is one of the fundamental rights; that bail is automatic and absolute."

With respect, I do not subscribe to the above propositions. It must be underscored that Chapter V of the Constitution is the one dealing with fundamental rights, and it is particularly section 70 which sets out the fundamental rights and freedoms of the individual. One of those fundamental rights are subject to respect for the rights and freedoms of others and for the public interest. Moreover, such fundamental rights and freedoms are subject to limitations set out in subsequent sections 71 to 83 of the Constitution, which are designed to ensure what the enjoyment of those rights and freedoms by any individual does not prejudice the freedoms of others or the public interest.

Section 72(1) of the Constitution sets out the circumstances and conditions under which a person may be deprived of his personal liberty, one of which being (e):

"Upon reasonable suspicion of having committed or being about to commit, a criminal offence under the law in Kenya."

The subsequent sub-sections of section 72 lays down the procedure to be complied with upon arrest or detention of a person, who is required to be taken before a Court and not to be further held in custody save upon the order of the Court. Section 72(5) of the Constitution, which is often quoted by the criminal lawyers for the purposes of bail, sets out conditions under which a person may be released.

Although the term 'shall' is used in section 72(5) it is not with regard to fundamental right that the word 'shall' is so used. It is, I would think, with regard to "is not tried within reasonable time" that the word 'shall' has been used. Be that as it may, it must be borne that fundamental rights of liberty are subject to respect for the rights and freedoms of others and for public interest. Public interest cannot be considered in isolation with public peace, tranquillity, and security. Public interest does include maintenance of law and order without which rule of law, which is the fountainhead of any Constitution of any country, would not subsist or sustain.

In the context of the provisions of the Constitution, the circumstances which led to the arrest of the applicants become relevant and one may not give a blind eye and deaf ear to these very provisions of the Constitution on which the structure of the Kenya Society and Government is founded. To do so would be to abdicate judicial responsibility to safeguard the canons of the Constitution.

The Public Order Act is designed to provide for the maintenance of public order. Reading various provisions of the said Act, it becomes at once apparent that they deal with public peace, tranquillity and security. It would therefore seem that the alleged contravention of certain provisions of the Act, in the context of fundamental rights and freedoms of other persons and of public interest become relevant.

It has been suggested by the counsel for the applicants that the University having been closed and the students being dispersed in various parts of the country, consequent upon the directions of the Government, there is no likelihood of threat to public peace, tranquillity and security. Can such submission be accepted on its face value? Must one conclude that the fears with regard to public interest and rights of other persons are imaginary and not real? I think not. Be that as it may, it must be emphasized the University of Nairobi is one of the important institutions of the Republic and its closure cannot be looked upon with equanimity and unconcern. It is a serious and grave matter. The closure of the University has been occasioned on more than one occasion because of the situation of law and order. In this context, also the issue of public interest as well as rights of others become relevant.

In considering the exercise of judicial discretion to admit the applicants on bail, I am very much conscious that those charged with the criminal offences are presumed innocent until proven or plead guilty. In the instant case, it may well turn out that the applicants were innocent victims caught in the police dragnet of that day. If otherwise, the temptation of not turning up at the trial may not be irrelevant.

In any event, the trial of these applicants upon the charges laid against them has already begun before a Senior Resident Magistrate. Under section 123(1) of the Criminal Procedure Code, the magistrate is empowered at any stage of proceedings to admit an accused person on bail. If during any stage of trial, the circumstances indicates so, there is nothing which would preclude the trial to exercise his discretion to grant bail.

However, at the moment, having considered all the circumstances anxiously and carefully, I have come to the conclusion that it would not be prudent and judicious to exercise the discretion of admitting the applicants to bail. The applications for bail are refused.

For the appellant:

Mr Ombete

For the respondent:

Mr Chunga

MJENGI V REPUBLIC

NO. 21 OF 1992; [1992] LLR 89 (HCT)

[1] Constitutional Law – Fundamental Rights and Freedoms – Severity of sentence – Whether mandatory minimum sentence of 30 years imprisonment is unconstitutional – Whether corporal punishment is unconstitutional.

Editor's Summary

The two appellants were charged and convicted of robbery with violence contrary to section 285 and 286 of the Penal Code.

They were each sentenced to the prescribed minimum sentence of 30 years imprisonment and ten strokes of corporal punishment.

They are now appealing against conviction and sentence as being unconstitutional.

The court has also been called upon to determine the issue whether denial of legal aid payable by the state is unconstitutional.

Held - The trial is a nullity because the appellants were denied of their statutory and constitutional right to legal representation paid by the state.

The mandatory minimum sentence of 30 years imprisonment under the Minimum Sentences Act is unconstitutional and void because it is an inhuman and degrading punishment.

The mandatory minimum sentence of 12 strokes of corporal punishment is unconstitutional and void as it is an inhuman and degrading punishment prohibited by article 13(b)(e) of the constitution.

Cases referred in the judgment

(“A” means adopted; “AL” means allowed; “AP” means applied; “APP” means approved; “C” means considered; “D” means distinguished; “DA” means disapproved; “DT” means doubted; “E” means explained; “F” means followed; “O” means overruled)

East Africa

Abdarahman Abdallah Magosso v Republic Dar-es-Salaam (High Court) criminal appeal number 36 of 1990 (UR)

AG v Lesinai s/o Ndeinai and others [1980] TLR 214

Alimasi Kalumbeta v Republic [1982] TLR 329

DPP v Daudi Pete criminal appeal number 28 of 1990 (UR)

DPP v Rugaimkamu [1982] TLR 139

Dube and another v The State Supreme Court number 2 of 12 1988 (UR)

Joshua s/o Nkonoki v Republic [1978] TLR 24

Khamisi Hamis Manywele v Republic High Court criminal appeal number 39 of 1990 (UR)

Laurent s/o Joseph v Republic [1981] TLR 351

Mohamed s/o Salim v Republic [1958] EA 202

Mugema v Republic [1967] EA 676

Samson v Republic [1958] EA 681

Yusufu s/o Gita v Republic [1958] EA 211

United Kingdom

Gales Hired v The King [1944] AC 149

Jackson and others v Bishop [1968] 404 F 2d 571

Privy Council in Riley and others v Attorney General of Jamaica [1982] 3 All ER 469

Queen v Hans Wind Vogel and Anor [1881] 2 EDC 98

Queen v Nortje [1880] 1 EDC 231

State v Petrus [1985] LRC

Tyre v UK [1978] 2 EHRR 1

United States

Furman v Georgia [1972] 408 US 238

Hart v Ceiner [1973] 433F 2d 136

Powell v Alabama [1932] 287 US 45

Tropp v Dulles [1958] 356 US 86 LEd 630

Weems v United States [1910] 217 US 349

Others

Maneka Gandhi v Union of India [1978] 2 SCR 248

Ncube Tshuma and Ndhlovu v The State [1988] LRC (Constitution) 442

Ncube, Tshuma and Ndhlovu v The State [1988] 2 SALR 702 (ZS)

The State (Healy) v Donoghue [1976] IR 325

The State v Arab [1990] 1 ZLR 253

Judgment

MWALUSANYA J: The two appellants Thomas s/o Mjengi and Ramadhani s/o Mussa whose appeals have been consolidated were charged and convicted of robbery with violence c/s 285 and 286 of the Penal Code Chapter 16. They were each sentenced to the prescribed minimum sentence of 30 years imprisonment and ten (sic) strokes of corporal punishment. They are now appealing against conviction and sentence. Under section 3 of the Legal Aid (Criminal Proceedings) Act number 21 of 1969 I granted legal aid to the two

appellants so that an advocate paid for by the government could argue their appeals. One Mr *Mbezi* was assigned to prosecute the appeal on behalf of the appellants.

Counsel for the appellants Mr *Mbezi* in his amended memorandum of appeal, raised three matters of constitutional importance and which are of public interests. The matters involve the interpretation of our Constitution with regard to the basic freedoms and rights. The Senior State Attorney, Dodoma who is the representative of the Attorney General was duly served with the amended memorandum of appeal and was quite aware of the constitutional matters raised and so section 17A(2) of the Chapter 360 as amended by Act number 27 of 1991 was duly complied with.

The three constitutional matters raised are:

First that the trial was a nullity because the indigent appellants were denied their right to free legal aid payable by the state nor were they informed of their right to free legal aid payable by the state nor were they informed of their right to engage counsel at their own expense; secondly that the mandatory Minimum Sentence of 30 years imprisonment is an inhuman and degrading punishment and so unconstitutional; thirdly that corporal punishment is an inhuman and degrading punishment and so unconstitutional. Besides those three constitutional matters, Counsel Mr *Mbezi* has also stated that the conviction was against the weight of evidence; and that the appellants were convicted of armed robbery an offence which is non-existence in the Penal Code and in any case they were convicted with an offence they had not been charged with.

On this point counsel for the appellants Mr *Mbezi* based his argument on my recent decision in the case of *Khamisi Hamis Manywele v Republic Dodoma* High Court criminal appeal number 39 of 1990 (UR) which I understand has gone to the Tanzania Court of Appeal, on appeal by the DPP. Therefore I will not spend much time discussing the genesis of the right to legal representation, as most of the points canvassed were thoroughly documented in the *Manywele* case (*supra*).

Suffice here to briefly state what that right is all about. The right to legal representation stands on two legs: The Constitutional right and the statutory right.

The Constitutional right to legal representation stands on two legs – first under article 13(6)(a) of our Constitution which provides for the right to be heard. There are three persuasive authorities which interpret the phrase ‘fair hearing’ in their Constitutions to include the right to legal representation paid for by the State for an indigent person whose constitutional rights are at stake. First we have the case of *Powell v Alabama* [1932] 287 US 45 decided by the

USA Supreme Court. Then from Zimbabwe the Supreme Court there in the case of *Dube and another v The State* Supreme Court Judgment number 2 of 12 1988. That case is defended by Gubbay JA of the Zimbabwe Supreme Court in his paper of 'Third Commonwealth Africa Judicial Conference' in Lusaka, Zambia April 1990, Titled 'Judicial Review in the enjoyment of Human Rights' published in the Commonwealth Law Bulletin Volume 16 number 3 of July 1990 from page 992-1001. The third persuasive authority is the decision of the Supreme Court of the Republic of Ireland in the case of *The State (Healy) v Donoghue* [1976] IR 325. That decision is defended by the John Kenny of the Supreme Court of the Republic of Ireland in his article 'A Bill of Rights' published in the *Northern Ireland Legal Quarterly* (1979) Volume 10 number at page 195.

The second leg on which the constitutional right rests is on the right to personal freedom under article 15(2) of our Constitution. That article stipulates that no one shall be deprived of his personal liberty except by procedure established by law. In India in the case of *Maneka Gandhi v Union of India* [1978] 2 Supreme Court number 248, interpreting a similar provision, it was held by the Supreme Court there, that no procedure can be regarded as reasonable, fair and just which does not afford legal representation to an accused person who is placed in jeopardy of his life or personal liberty in a criminal proceedings. The above decision was in principle adopted by the Tanzania Court of Appeal in the Case, of *DPP v Daudi Pete* criminal appeal number 28 of 1990 (UR). The right to legal representation for the poor includes the right to be informed of that right by the trial court, so decided the Supreme Court of India in the *Maneka Gandhi* case (*supra*). Bhagwati JA the former CJ of India defends the above case, in his article 'Human Rights as evolved by the jurisprudence of the Supreme Court of India published in the *Commonwealth Law Bulletin* Volume 13 number 1 January 1987 at pages 230-245.

In fact the right to legal representation for the poor is recognized all over the world. It is contained in the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1976), article 7(1) of the African Charter of Human and People's Rights (1981), and article 6(3)(1) of the European Convention on Human Rights (1950). Therefore the right to legal representation is accepted by the community of nations as a birthright for every human being.

That is why I hold that the statutory right to legal representation is contained in section 310 of the Criminal Procedure Act number 9 of 1985 as interpreted in the light of international human rights stands and norms as above adumbrated. In short section 310 of the Criminal Procedure Appeal should be interpreted to mean that those who can afford to pay have a right to

legal representation; and those who cannot afford to pay (i.e. who are poor) have an equal right to free legal aid paid for by the State, as provided in the Legal Aid (Criminal Proceedings) Act number 21 of 1969. That right includes the right to be informed of that right by the trial court. Perhaps it is important to emphasize that, the above construction of section 310 of the Criminal Procedure Act is inevitable in the light of international human rights standards and norms. As Mr Justice Gubbay of Zimbabwe Supreme Court states at page 999 (in his article cited above):

“In giving meaning to legislation on human rights expressed in general or even vague terms, where uncertain or incomplete there is ample scope for a Judge to look to international developments and draw upon them in seeking a solution. International human rights instruments and precedents provide invaluable information and guidance. A judicial decision has greater legitimacy and will command more respect if it accords with international norms that have been accepted by many countries, than if it is based upon the parochial experience or foibles of a particular Judge or Court.”

That is one way of reaching at the conclusion that there exists a statutory right to legal representation for the poor i.e. by way of seeking guidance from international human rights instruments.

The other way of establishing the statutory right to legal representation is the generous and purposive construction of section 310 of the Criminal Procedure Act interpreted in the light of Act number 21 of 1969. Those provisions were enacted to inculcate in our heads that justice should not only be done, but should be seen to be done. It will be recalled that before the 1969 legislation, the right to legal representation for poor accused persons was restricted to capital offences (murder, treason and manslaughter). However after the 1969 Act, the right to legal representation for poor accused persons was extended to cover non-capital offences like theft, causing grievous harm, robbery etc, which are triable by the District Courts and RM's Courts.

Counsel for the appellants Mr *Mbezi* has exclaimed at the existing anomaly. He said for offences like incest or written threats to murder, punishable with a maximum of not more 5 years and 7 years imprisonment respectively, the offenders are provided free legal aid by the State simply because the offences are triable by the High Court. However offenders charged with offences like armed robbery, punishable with free legal aid, simply because the offender is charged in a subordinate court. That is unfortunate. It is submitted that the correct interpretation of the decision of the Tanzania Court of Appeal in the case of *Laurent s/o Joseph v Republic* [1981] TLR 351, is that in either case whether the offence is triable by the High Court or subordinate court, the trial is a nullity if the indigent accused person was not provided with counsel, at least for all serious offences.

That a certifying authority under section 3 of the Legal Aid (Criminal Proceedings) Act number 21 of 1969 has a discretion to refuse or grant legal aid to poor accused person is a myth. The EACA in the case of *Mohamed s/o Salim v Republic* [1958] EA 202 which originated from Tanganyika said at page 203:

“That in such a case (the Certifying authority) should give the matter anxious consideration before deciding to refuse a certificate for aid on the ground of sufficiency of means; that a reasonably liberal interpretation ought to be placed on the section and that in case of doubt the discretion should be exercised in the prisoners’ favour.”

I wish only to point out that section 3 of the Poor Prisons Defence Ordinance Chapter 21 which the above case was interpreting is in *pari materia* with our section 3 of Act number 21 of 1969. In fact Prof James Read in his *tours de force* article ‘*The Advantage of Counsel*’ in the ‘East African Law Journal’ Volume VIII number 4 of 1971 concludes at page 294 that the certifying authority has no option but to grant legal aid if the accused is poor. He says:

“Although the decision in the *Gales Hired v The King* [1944] AC 149 turned in part upon the mandatory nature of the legislative provision for legal aid in Somaliland, it has been regarded as establishing a general principle – see for e.g. the remarks of EACA in *Samson v Republic* [1958] EA 681 at page 682 at page 683 where they said: ‘we do not think that anything turns upon the fact that appellants were entitled as of right to have an advocate assigned.’ See also the judgment of Bennet J of High Court of Uganda in *Yusufu s/o Gita v Republic* [1958] EA 211 at page 213: ‘every accused has the undoubted right to be defended by counsel.’”

It is astonishing to learn that since 1969 the members of the Judiciary and the Bar have with a calculated conspiracy of silence buried their heads in the sand like ostriches, pretending that they are unaware of the above authorities of the EACA. Without shame they have glorified the right of these who can afford to be defended by counsel, while quite obvious to the similar right of poor persons tried by subordinate courts. Such an anomalous practice can be seen in such cases as: *DPP v Rugaimkamu* [1982] TLR 139; *Alimasi Kalumbeta v Republic* [1982] TLR 329; *Joshwa s/o Nkonoki v Republic* [1978] TLR number 24; *Mugema v Republic* [1967] EA 676. The poor accused persons triable by the subordinate courts and Economic Crimes Courts have been completely forgotten. The judiciary and members of the Bar are in the dock for having left the poor accused persons in the cold for far too long since 1969.

Counsel for the Republic Mr *Kifunda* was candid enough to concede that a poor accused person has a statutory right to be provided with free legal aid and to be informed of that right by the trial court. He said that right stems from the purposeful construction of section 310 of the Criminal Procedure

Act as read in the light of section 3 of the Act number 21 of 1969. He said for all serious offences triable by the subordinate courts, poor accused persons have the right to free legal aid paid for by the State. He conceded that the trial in this case was a nullity and said that he would pray for a retrial.

However, Mr *Kifunda* would not go as far as stating that a poor accused person has a *constitutional right* to free legal aid. He said that so long as an accused person has failed to perform his duties to society by committing a crime, then he forfeits his rights to free legal aid as per Act 29(1) of our Constitution. It is the same point that prompted Mr *Kifunda* to appeal to the Tanzania Court of Appeal in the *Manywele* case (*supra*). The short answer to that argument is that it is faulty in that it presupposes that the poor accused person has already been found guilty. And I wonder if it makes any great difference if the right to free legal aid for poor accused persons is founded on a statutory provision or a constitutional provision.

In the event I held that the trial was a nullity because these poor appellants were denied of their statutory and constitutional right to free legal aid, and were not informed of that right by the trial court.

Under Act 13(6)(e) of our Constitution, it is provided that, for the purposes of ensuring equality before the law, the State shall make provisions to the effect that no person shall be subjected to torture or to inhuman or degrading treatment.

The test as to whether a mandatory minimum sentence is inhuman and degrading is the disproportionate test which is now universally recognized. Punishment which is so excessive, arbitrary, unusual or disproportionate to the offence as to shock the public conscience that is the conscience of a reasonable man is prohibited. The provision encompasses a cardinal principle of human justice namely that punishment should be proportional to the offence for which it is enacted. The said provision draws its meaning from the evolving standards of decency that mark the progress of a maturing society. The disproportionate test was first propounded in the USA by the Supreme Court in the case of *Weems v United States* [1910] 217 US 349 which was discussing the Eighth Amendment of the US Constitution. The matter was revisited in *Tropp v Dulles* [1958] 356 US 86 LE 630 and later in the case of *Furman v Georgia* [1972] 408 US 238 and the case of *Hart v Ceiner* [1973] 433F 2d 136.

The above mentioned test was adopted by the Supreme Court of Papua New Guinea in Reference by the Marobe Provincial Government (1958) LRC (Constitution) 642. In there a bench of five judges sat to decide if the Summary Offences Act which provided for mandatory minimum sentences of 10 years and other mandatory minimum sentences of 10 years and other mandatory minimum fine sentences were constitutional and not an inhuman

and degrading punishment. Among the five judges, three (Bred Meyer, Kaputin and McDermott JJ) agreed that the disproportionate test was the proper test in the circumstances. However, the other two judges (Kidu CJ and Kapi DCJ) did not agree that the disproportionate test ought to be invoked.

Two of the three judges who invoked the disproportionate test (i.e. Bred Meyer and Kaputin JJ) held that:

- (1) The minimum penalties here, although high were not so excessive as to offend Act 36 of the Constitution. They said that although the sentences were very severe, they were not so disproportionate as to be regarded as excessive and unconscionable. They said the sentences were very severe, they were not so disproportionate as to be regarded as excessive and unconscionable. They said the sentences reflected a legitimate need for strongly deterrent penalties, providing an index of contemporary community standards.
- (2) The minimum penalties do not infringe the Constitution because the harshness of those penalties is tempered by section 138 of the District Court Act which allows for imposing lesser sentences if special reasons are shown as regards character, antecedents, age, health or mental condition of the accused or trivial nature of the offence or to the extenuating circumstances under which the offence was committed.

On the other hand the third judge Mc Dermott J invoking the disproportionate test found that the minimum sentences prescribed offended the Constitution because each of them imposed a penalty which would be wholly disproportionate to the offence in readily imaginable situations, as the impugned legislation treated all offences in each category as equally reprehensible up to an arbitrarily set level of punishment, preventing the court considering any of the usual factors relevant in sentencing individuals.

More recently the Zimbabwe Supreme Court invoked the disproportionate test in the case of *The State v Arab* [1990] 1 ZLR 253. It concerned the Precious Stones Trade Act 1978 which prescribed minimum sentences for those found dealing in precious stones illegally. The appellant was convicted of dealing in emeralds and was sentenced to three years imprisonment, being the minimum sentence. The court found no special reasons which could make it pass a sentence lesser than the minimum. The Supreme Court held that the power of the trial court to consider and if appropriated find special reasons allowed for a sentence which was not necessarily disproportionate. So the provision was held not to be unconstitutional. A disproportionate test had earlier been invoked by the Zimbabwe Supreme Court in *Ncube, Tshuma and Ndhlovu v The State* [1988] 2

SALR 702(ZS) a case which concerned the constitutionality of the punishment of whipping.

In Botswana, the Court of Appeal in the case of the *State v Petrus* [1985] LRC (Constitution) 699 agreed that the disproportionate test was the appropriate test to find out if any punishment prescribed by legislation was constitutional or not i.e it was not cruel, inhuman and degrading punishment.

The above discussion vindicates my earlier statement that the disproportionate test is universally recognized and accepted. I adopt it for use in Tanzania. It will be seen from the above discussion that the disproportionate test focuses on two factors which may render the punishment unconstitutional: First if the minimum sentence is arbitrarily fixed. Secondly if the sentence is inherently excessive or unconscionable.

On the first point I am satisfied that the Minimum Sentences Act number 1 of 1972 as amended by Act number 10 of 1989 has fixed the minimum sentences arbitrarily. What the challenged legislation here effectively does is treat all offences as equally reprehensible up to an arbitrarily set level of punishment. Thus all offences of armed robbery have a minimum sentence of 30 years, while simple robbery a minimum level of punishment is simply not called for. This crudely applied across – the board, approach denies to the person being punished any consideration of the following factors: degree of participation, the age of the offender, the offender's previous good record, the remorse and prevalence of the offence etc. If the courts in Tanzania were allowed to pass a lesser sentence if special reasons are adduced, then that would have been alright and the legislation would have been constitutional as shown by the two cases cited above (Morobe case) from Papua New Guinea and the Arab case from Zanzibar. In order for the Act number 1 of 1972 to be constitutional, section 6(1) of the Act should be amended such that special reasons should be allowed to be adduced for every convict and not only to those convicted on property not exceeding TShs 100. Moreover the Minimum Sentences Act in applying minimum terms of imprisonment carte blanche precludes considerations being given to (a) probation (b) conditional discharge (c) suspended sentences (d) entering into recognizance etc. That much it has rendered the impugned legislation to be arbitrary and disproportionate.

On the second point, I am of the considered view that the minimum sentence of 30 years imprisonment is disproportionate because it is excessive or unconscionable even for the offence of armed robbery. A punishment is 'excessive' if it makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purpose and needless imposition of pain and suffering. Brian Slattery in his book *A Handbook on Sentencing in Tanzania* (1972) EA Literature Bureau says at page 27:

“Punishment for criminal offences is generally viewed as serving one or more of three main purposes: (a) deterrence, both of the criminal himself (special deterrence) and also of society at large (general deterrence) (b) the rehabilitation of the criminal; and (c) restraint – the isolation of the hardened or dangerous criminal from society. These objectives are seen as constituting the ultimate justification for sentence imposed by a court in place of the more traditional view which simply holds that evil men deserve to be punished, which notion is sometimes called retribution or the notion of justice.”

The government takes rehabilitation as of top priority as shown in section 61 of the Prisons Act number 34 of 1967 – wherein emphasis is laid on training of prisoners so that when the prisoner comes out he becomes a good citizen usefully self employed. Now the 30 years imprisonment is self-defeating because that period is the life – expectancy of a Tanzanian, on the average, and so the rehabilitation policy is not in place. It appears the government on enacting those severe sentences had in mind only retribution and restraint of the offenders. But it should be remembered that restraint of offenders is reserved for recidivists only (hardened and dangerous criminals). And retribution as a sentencing policy is old-fashioned and uncivilized as it espouses sadism. It will be seen therefore that the punishment of 30 years minimum sentence, goes beyond legitimate penal objectives and does not bear a rational relationship to the accomplishment of penological goals which are of sufficient importance to justify its severity. The 30 years imprisonment is indeed purposeless and needless imposition of pain and suffering, as the legislative purpose could be served by a less severe punishment.

Therefore to suggest that our Parliament had seriously addressed itself to the whole issue of sentencing is a premise which is obviously suspect. This is because it is both simplistic and unrealistic to suggest that an increase in the severity of punishment by itself will have any significant impact on existing patterns of crime.

Where moral values are central to a problem such as crime, the legal system struggles to achieve even incidental significance. The working of the criminal justice system can have little, if any, impact on complex sociological phenomena. Any discussion of crime and punishment inevitably overlooks the heart of the dilemma. Really, what we have is a major problem involving education and policing.

A sociological phenomenon cannot be effectively influenced by judicial band-aiding. Imposing harsh sentences indiscriminately is nothing other than Kangaroo justice. It just does not work and stands little chance of effectively influencing current crime rate. So we cannot look for the courts alone, otherwise that would be a fundamental misunderstanding of the role of the courts. All that the justice seem can reasonably do at the present time is to

maintain a predictable and reasonable response to the increasing crime rate, in terms of what most Tanzanians really and truly might be the consequences of detection on conviction (moderate prison sentences). Any major change can only be effected at the political level, when, if ever, our legislators are encouraged to get serious about what has become a problem of grave national importance. It is my finding therefore that the minimum sentence of 30 years is unconstitutional because it is inhuman. It is inhuman because it is disproportionate and excessive – as it makes no measurable contribution to acceptable goals of punishment; and goes beyond legitimate penal objectives. It bears no rational relationship to the accomplishment of penological goals. As White J said in the case of *Furman v Georgia* (*supra*) at page 391 this punishment is with only marginal contributions to any discernible social or public purpose. A penalty with such negligible returns to the State would be patently excessive and unusual and cruel punishment violate of the Eighth Amendment.

Therefore I don't agree with the State Attorney Mr *Kifunda* that the sentence of 30 years imprisonment is proportionate to the offence of armed robbery. I subscribed to the view canvassed by the defence counsel Mr *Mbezi* that the sentence of 30 years is too severe to deserve to be termed inhuman and cruel. Mr *Mbezi* also contended that under article 15(2) of our Constitution, Parliament is empowered to take away the personal freedom of an individual only by using law which is fair, reasonable and not arbitrary. He said that the law on criminal procedure and evidence should be fair and reasonable. That he said is the full import of the case of *DPP v Daudi Pete* criminal appeal number 28 of 1990 (UR) which had cited the Indian case of *Maneka Gandhi v Union of India* [1978] 2 SCR 248. So he said that since a sentence of 30 years imprisonment is patently excessive, then it offends the doctrine expounded in the *Daudi Pete* case. At this stage, all I can say is that there is merit in the argument brought forth by the defence counsel.

Corporal punishment is one of the punishments permissible under section 28 of the Penal Code Chapter 16 and where imposed, it is to be inflicted in accordance with the Corporal Punishment Ordinance Chapter 17 and the Corporal Punishment Order (GN 74 of 1930 and GN number 76 of 1941) made thereunder. The independent government of Tanganyika made corporal punishment mandatory for certain offences under the Minimum Sentences Act number 29 of 1963. The Bill was greeted with enthusiasm by parliamentarians some of whom went even further than the government proposals suggesting more torture as part of punishing offenders – see LP Shaidi in his “Explaining Crime and Social Control in Tanzania Mainland: An Historical Socio-economic Perspective”, A PhD Thesis submitted to the University of Dar-es-Salaam in 1985 at page 323-331 where the author quotes the Parliamentary Debate.

In 1972 mandatory corporal punishment was abolished by the Minimum Sentences Act number 1 of 1972 only to be brought back in 1989 by Act number 10 of 1989. Once again the honourable members of Parliament shocked the nation by applauding the re-introduction of corporal punishment should be administered in public (market place) and that women offenders should not be exempted – see the Daily News of 25 April 1989.

Defending the Bill against an objection of a lone parliamentarian on the ground that corporal punishment might be contrary to the Bill of Rights, the Minister for Justice and Attorney General argued that bandits and robbers were breaching the rights of other citizens and therefore it was in the interest of the community at large that corporal punishment was being re-introduced. The Minister proffered his legal opinion that the constitutional validity of the proposed law would be covered under the derogation clause article 30 of the Constitution – see Radio Tanzania Report of the Parliamentary proceedings, excerpts broadcast live on 24 April 1989.

It appears to me that basically two different situations can render punishment to be cruel, inhuman and degrading. First a punishment which is not inherently inhuman or degrading may become so by the mode of execution. Secondly that certain types of punishment are inherently or by their nature cruel, inhuman or degrading e.g. infliction of acute pain and suffering. I shall discuss these two situations separately.

As stated above the mode of executing of the punishment can render that punishment to be cruel and degrading. That was the decision of the full bench of five judges of the Court of Appeal of Botswana in the case of *The State v Petrus and Anor* [1985] LRC (Constitutional) 699. That court led by Maisels P held that the manner of punishment which was administered by repeated and delayed instalments of corporal punishment was *ultra vires* the Constitution. The legislation there had provided that the convicted person should be given four strokes each quarter in the first and last years of his term of imprisonment, and the prescribed penalties of imprisonment with corporal punishment were mandatory sentences. In the course of its decision, the Court of Appeal drew support from decisions of the European Court of Human Rights, the US Supreme Court and to a strong dissenting opinion of the *Privy Council in Riley and others v Attorney General of Jamaica* [1982] 3 All ER 469. In fact Aguda JA said at page 727-728.

“I am entirely in agreement with the submission of Mr Hodes for the appellants that corporal punishment administered by instalments when tacked onto a term of imprisonment, cannot but bring about aggravated torture upon the human being made subject to that sort of punishment. To describe such a type of punishment as degrading is perhaps the very least that can be said of it.”

In fact that was the view of the State Attorney Mr *Kifunda* in this case. Commenting on the manner or mode of executing punishment as one of the causes of cruel punishment Mr Blackman of the US Supreme Court in the case of *Jackson and others v Bishop* [1968] 404 F 2d 571 said at page 579-580.

“There can be no argument that excessive whipping or an inappropriate manner of whipping or too great frequency of whipping or the use of studded or over long straps, all constitute cruel and unusual punishment. Corporal punishment generates hate toward the keepers who punish and toward the system which permits it. It is degrading to the punisher and to the punished alike. This record cries out with testimony to this effect from expert penologists, from the inmates and from their keepers.”

Now Tanzania like Botswana has a legislation which sanctions corporal punishment by instalments. The Minimum Sentences Act number 1 of 1972 as amended by Act number 10 of 1989 introduced corporal punishment by instalments. The Corporal Punishment Ordinance Chapter 17 is amended in section 12 whereof corporal punishment shall be inflicted in the instalments, each consisting of six strokes, the first instalment at the commencement of the term of imprisonment and the other immediately before the person in question is finally released. That is a horrible situation.

It is noteworthy that postponed whipping or whipping by instalments was deemed as cruel as long ago as 1880 in apartheid South Africa. In the case of *Queen v Nortje* [1880] 1 EDC 231 the Eastern District Court of South Africa held that corporal punishment by instalments (part of the lashes to be inflicted at one end the remainder at the expiration of the sentence) was illegal. The case of *Queen v Hans Wind Vogel and Anor* [1881] 2 EDC 98 is to the same effect. That court found it highly objectionable to sentence persons to lashes to be inflicted at the expiration of a sentence of hard labour. It is my finding therefore that corporal punishment this case, is unconstitutional because it is cruel, inhuman and degrading as it is inflicted by instalments.

The second situation I earlier alluded to is as to whether corporal punishment is inherently and by its very nature cruel, inhuman and degrading. The leading case in this regard is the decision of the European Court of Human Rights which was cited with approval both by the Zimbabwe Supreme Court and the Botswana Court of Appeal. It is the case of *Tyre v UK* [1978] 2 EHRR 1, where a 15 year old boy was sentenced by a juvenile court in the Isle of Man to three strokes of the birch on conviction of assault. The Court found that, while the punishment, did amount to degrading punishment and therefore was in violation of Act 3 of the European Convention which is identical to our Act 13(16)(e) of our Constitution. The substantive paragraph in the judgment deserves to be quoted in extensor, they said at page 11:

“The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalized violence, that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment whereby he was treated as an object in the power of the authorities – constituted an assault on precisely that which it is one of the main purposes of Act 3 to protect, namely a person’s dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects. The institutionalized character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender.”

The aura of official procedure attending corporal punishment that the European Court refers to with apparent disgust is even more disgusting in Tanzania under the Corporal Punishment Order which provides:

“A sentence of corporal punishment shall be inflicted upon adults upon the bare buttocks with a light rattan cane which is free from knots. Such cane shall be not less than half an inch and not more than five – eighths of an inch in diameter and shall not exceed four-two inches in length.

During the infliction of a sentence of corporal punishment the person undergoing punishment shall be so secured that he cannot, by reason of the movement of his body, cause the strokes to fall upon any other part of his body than upon which they are to be inflicted in accordance with this Order.”

If as in this case, one has to use a value judgment, it seems to me that the corporal punishment incapable falls within the definition of inhuman and degrading punishment.

In the case decreed by the Supreme Court of Zimbabwe *Ncube Tshuma and Ndhlovu v The State* [1988] LRC (Constitution) 442 after reviewing the position in Zimbabwe, South Africa, UK, Canada, Australia and The United States, Gubbay concluded that:

“Fortunately on the few occasions where the issue of whether whipping is constitutionally defensible has been judicially considered, it appears to have resulted in little difference of opinion, whether imposed upon an adult person or a juvenile offender the punishment in the main has been branded as both cruel and degrading.”

Mr Gubbay described the penalty of whipping as:

“Not only inherently brutal and cruel. It is relentless in its severity and contrary to the traditional humanity practised by almost the whole of the civilized world, being incompatible with the evolving standards of decency.”

The approach to constitutional interpretation adopted by the Zimbabwe Supreme Court and Botswana Court of Appeal has been in Bangalore, India in February 1988. The Bangalore Principles which that meeting adopted recognized and affirmed the relevance and importance of:

A growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete.

That view was reiterated by the Commonwealth Judges in the Harare declaration of Human Rights (Harare Principles – Judicial Colloquium in Harare, Zimbabwe 19 – 22 April 1989) and also in the Banjul Affirmation (Judicial Colloquium in Banjul, The Gambia 7 to 9 November 1990).

It is gratifying to note that the Nyalali Commission (1992) (The President Commission on whether Tanzania should adopt a one-party or multi-party system) in its Report, Book Three at page 10 holds the view that corporal punishment is inherently cruel, inhuman and degrading and contrary to article 13(6)(3) of our Constitution. Such a considered view from eminent Tanzanians should weigh highly on this court. There can be no doubt that corporal punishment is against the dignity of man as stipulated in article 9(1)(a) of our Constitution which is part of the *Fundamental Objectives and Directive Principles of State Policy*. The Zimbabwe Supreme Court in the Ncube case (*supra*) on the same theme said:

“The *raison d’être* underlying section 15(1) is nothing less than the dignity of man. It is a provision that embodies broad and idealistic notions of dignity, humanity and decency, against which penal measures should be evaluated. It guarantees that the power of the State to punish is exercised within the limits of civilized standards. Punishments which are incompatible with the evolving standards of decency that mark the progress of maturing society or which involve the unnecessary and wanton infliction of pain, are repugnant. Thus a penalty that was permissible at one time in own nation’s history is not necessarily permissible today. What might not have been regarded as inhuman or degrading decades ago may be revolting to the new sensitivities which emerge as civilization advances.”

Those decisions on the unconstitutionality of corporal punishment are examples of the prudent application of international human rights norms to domestic human rights law. They identify with evolving standards of decency and humanity. Tanzania cannot be left behind in that boat.

Therefore when the Attorney General suggests above that corporal punishment is constitutional because it is saved by the derogation clause in Act 30(2)(b) of our Constitution, it beats my comprehension. Act 30(2)(b) states that a legislation which infringes the Constitution is valid if it is wholly for ensuring the interests of defence, public safety, and public order. However as

pointed out by the Tanzania Court of Appeal in the case of the *DPP v Daudi Pete* criminal appeal number 28 of 1990, any derogation clause must meet the proportionality test or reasonableness test. It should be given a restricted but purposive construction, so that the basic rights of the citizens are not marginalized nor completely emasculated by the derogation clause. For the derogation clause to apply to a given situation it must be shown that it is required by a compelling social need and that it is so framed as not to limit the right in question more than is necessary to achieve a legitimate objective. For example in the *Daudi Pete case (supra)* it was found that the legislation denying accused persons bail was too broad as to take away the basic right to freedom to all and sundry. Equally here the derogation clause cannot be interpreted so broadly so as to cover every cruel, inhuman and degrading punishment. A derogation clause should not be interpreted as entitling the government to impose vague or arbitrary limitations on basic human rights; but that limitation should be reasonable and only be invoked when there exists adequate safeguards and effective remedies against abuse. In other words a derogation provision has to be construed narrowly. I do not conceive it to be the duty of this court to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve. As the Tanzania Court of Appeal observed in the case of *AG v Lesinai s/o Ndeinai and others* [1980] TLR 214. 'A constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation'. I may point out that Prof Issa G Shivji is of the same view that the derogation clause does not save corporal punishment from being unconstitutional see his paper 'State Coercion and Freedom in Tanzania' a Monograph by the Institute of Southern African Studies, National University of Lesotho (1989) at page 22.

In conclusion I hold that corporal punishment not only is it inherently inhuman and degrading, and so unconstitutional; but in addition international statements of human rights indicate that such type of punishment has become simply unacceptable in a civilized and democratic society. The weight of international opinion is against corporal punishment. It is up to us to remain an island on ourselves.

Under this head, I will have to consider as to whether the offence of armed robbery exists, secondly as to whether the trial court had power to impose the sentence that was awarded and finally review the evidence on record.

On the first point Mr *Mbezi* argued that the offence of armed robbery is not contained in the Penal Code Chapter 16. He said that the trial magistrate was wrong to sentence the two appellants for an offence which they were not charged with nor convicted of. In fact that is the same view that was canvassed

before Mushi J in the case of *Ibrahim Hassani and another v Republic* High Court criminal appeal number 92 and 107 of 1990 that argument found favour with Mr Mushi who quashed the sentences. I understand the DPP is appealing to the Tanzania Court of Appeal. However my considered view is that the offence of armed robbery is there in the Penal Code in sections 285 and 286. This comes about if the court invokes a generous and purposeful construction on the Penal Code and the Minimum Sentences Act. Armed robbery is committed under sections 285 and 286 where the offender is armed with any dangerous or offensive weapon or instrument. That is what parliament intended to curb. Therefore Mr Mbezi's argument fails.

The next point is as to whether the trial magistrate had power to impose a 30 year prison sentence. It will be recalled that under section 170(1) of the Criminal Procedure Act number 9 of 1995 a subordinate court may not pass a sentence of imprisonment exceeding eight years for any offence falling under the Minimum Sentences Act number 1 of 1972. However, section 170(4) of the Criminal Procedure Act states:

"The provisions of sub-section (1) shall be without prejudice to the provisions of any written law authorizing a subordinate court to impose in relation to any offence specified in such written law, a sentence in excess of the sentences provided for in that sub-section."

That provision was a subject of interpretation by Msumi J in *Abdarahman Abdallah Magosso v Republic* Dar-es-Salaam (High Court) criminal appeal number 36 of 1990. In the judgment delivered on 19 September 1991. Msumi J held that since the provisions in the Penal Code did not confer on the subordinate courts extended power of sentencing, then it was illegal for the subordinate courts to pass a sentence of over eight years for scheduled offences. I agree with that view. What the trial magistrate should have done was to commit the accused to the High Court for sentencing. The trial magistrate had no power to impose the 30 year prison sentence.

It behoves me to review the evidence on record, in case I am wrong on the above thesis about the constitutionality of the trial. The case involves the identification of the culprits at the scene of the crime. There was a torch at the scene of the crime. The culprits are villagemates and so the faces were quite familiar. The bandits spent a considerable long time demanding to be shown the money.

The husband and wife purported to have had identified the culprits.

The appellants offered an alibi. The trial magistrate warned himself of the danger of convicting the culprits on evidence of identification which is not watertight. In my considered view the convictions were proper. The case was proved beyond any reasonable doubt.

The trial is a nullity because the appellants who are indigent were denied of their statutory and constitutional right to legal representation paid for by the State. The trial was also a nullity because the appellants were not informed of their right to have legal representation. As regards sentence, the trial magistrate had no power to pass a sentence over eight years imprisonment. In any case the mandatory minimum sentence of 30 years imprisonment under the Minimum Sentences Act number 1 of 1972 as amended by Act number 10 of 1989 is unconstitutional and void because it is an inhuman and degrading punishment. The mandatory minimum sentence of 12 strokes of corporal punishment (not 10 strokes as the trial magistrate imposed) is also unconstitutional and void as it is an inhuman and degrading punishment, prohibited by article 13(6)(3) of our Constitution.

Should I order a retrial? The appellants have been in prison now 2½ years. I think this is a fit case where I have to leave it to the DPP to decide whether appellants should be retried or not. Thus I leave it to the DPP to decide.

Consequently the appeal is allowed. The convictions are quashed and sentences are set aside. The appellants should be released forthwith, unless held for any other offence.

For the appellant:

Mr Mbezi

For the respondent:

Mr Kifunda

NG'ANG'A V REPUBLIC
NO. 61 OF 1981; [1981] LLR 5982 (HCK)

[1] Constitutional Law – Fundamental Rights and freedoms – Constitutional protection from discrimination under section 82 of the Constitution – Whether granting bail to one accused but denying a jointly co-accused is discrimination.

Editor's Summary

The applicant was charged together with 4 others with conspiracy to commit a felony.

The applicant was arrested and charged after one of the co-accused had been charged and released on bond pending hearing of the case. The applicant was however denied bail and now appeals against the same on the ground that he is being discriminated against by being denied bail while the co-accused was granted.

Held - Granting or refusing of bail to one accused person where his jointly charged co-accused are granted or refused bail is not to treat that person in a discriminatory manner contrary to section 82(2) of the Constitution.

The meaning of discriminatory in section 82(2) is not the same as ordinary meaning of the word as the word has been assigned a special and restrictive meaning by sub-section (3) of the same section. The applicant did not fall within any of the discriminatory categories referred to in sub section (3).

Applicant for bail dismissed.

No cases referred to in ruling

Ruling

CHESONI JA: The applicant was charged with four others with conspiracy to commit a felony contrary to section 393 of the Penal Code. The particulars of the offence alleged that on diverse dates between 10 September 1980 and 2 October 1980 in Nairobi within the Nairobi Area, the accused jointly with others not before the court conspired together to commit a felony namely theft of KShs 20 032 602-05 (equivalent to DM 4 875 654-60) the property of the Kenya Government.

One of the five accused pleaded guilty to the charge and was dealt with accordingly. Of the remaining four the first accused Elseus Peter Ahenda successfully applied for and was granted bail pending the hearing of the case. This took place before his co-accused were arrested and charged. The first

accused was arrested on 2 October 1980, and on 8 October 1980, he appeared in court when he was released on his own bond of KShs 100 000 plus two sureties of like amount. This in fact forms the basis of the present application. The applicant has applied to be released on bail pending the hearing of the case. They were arrested in 7 November and taken to court when his bail application was objected to by the prosecution and refused by the court.

The affidavit in support of the application was sworn to by the applicant's counsel, David W Karanja, who in paragraph 8 thereof has deposed as follows:

- “(8) That I verily believe that the release of the first accused in the circumstances was discriminatory on the face of it and cannot in any way be justified in law.”

This argument is based on the contention in paragraph 7 of the same affidavit where the deponent states:

- “(7) That the applicant and the first accused in the said criminal case face the same charge and should have been treated equally before the law.”

It is true all the accused in the case are charged with the same offence and they are charged jointly, but whether that calls for the same treatment in granting or refusing each accused person's bail application is another matter. In support of his contention, Mr *Karanja* referred the court to section 82(2) of the Constitution of Kenya which provided that:

- “82(2) Subject to sub-sections (6), (8) and (9) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.”

At the hearing of the application, Mr *Karanja* expounded further on what he had deposed to in paragraphs 7 and 8 of his affidavit. He contended that the Senior Resident Magistrate was acting by virtue of a written law, i.e. section 123 of the Criminal Procedure Code, when he considered the bail application of the applicant, but she treated the applicant in a manner contrary to section 82(2) of the Constitution. Citing section 72(5) of the Constitution, he added that it was the applicant's constitutional right to be released on bail if he was not to be brought before the court as soon as is reasonably practicable. Section 72(5) of the Constitution says:

- “72(5) If any person arrested or detained as mentioned in sub-section (3)(9)(b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions as are reasonably necessary

to ensure that he appears at a later date for trial or for proceedings preliminary to trial.”

Mr *Karanja* argued further that it had taken five months and unless the applicant was going to be tried within a reasonable time he was entitled to be released on bail. The only relevant question, he maintained, was whether or not the accused if released on bail would turn up at his trial and as far as his client was concerned, he would turn up. The applicant was a Kenya citizen with no travel documents and would be able to furnish substantial sureties.

The application was strongly opposed by the Principle State Counsel, Mr *Chunga*, who outlined the history and circumstances of the case. He submitted that section 82 sub-section (2) of the Constitution had no application and that there had been no discrimination in the manner the applicant had been treated within the meaning of section 82(2). He advanced his argument on the basis that even where more than one accused persons are jointly charged with a criminal offence, the case of each accused must be examined in its own facts against that accused and that this was a cardinal rule of the criminal law and the same principle applied with the same force and validity to applications for bail. The application of each accused where several or more persons are jointly charged with an offence, must be considered on its own facts, circumstances and merit.

With respect, I agree with the Principal State Counsel. Just as finding one accused charged with others jointly guilty or innocent does not implicate or set free the co-accused and is not discriminatory treatment, so is the case with granting or refusing bail to one or more accused persons charged jointly with others some of who may be out on bail. This is so because the facts, circumstances and merit of one co-accused may be such that granting him bail is justified, whereas those of his co-accused may mitigate against bail. Each case must be considered on its own merit, facts and circumstances before the court exercises its discretionary powers of granting or refusing bail.

Admittedly, admission to bail is a constitutional right of an accused person if he is not going to be tried reasonably soon, but before that right is granted to the accused there are a number of matters to be considered. Even without the Constitutional provisions (section 72(5)) generally in principle and, because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail, unless it is shown by the prosecution that there are substantial grounds for believing that:

- (a) The accused will fail to turn up at his trial or to surrender to custody; or
- (b) The accused may commit further offences; or

- (c) He will obstruct the course of justice.

The primary purpose of bail is to secure the accused person's attendance at court to answer the charge at the specified time. I would, therefore, agree with Mr *Karanja* that the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial. In considering whether or not the accused will attend his trial the following matters must be considered:

- (a) The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty. Where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences there may be no such incentive.
- (b) The strength of the prosecution case. The court should not be willing to remand the accused in custody where the evidence against him is tenuous, even if the charge is serious. On the other hand, where the evidence against the accused is strong, it may be justifiable to remand him in custody.
- (c) The character and antecedents of the accused. Where the court has knowledge of the accused person's previous behaviour these may be considered, but by themselves they do not form the basis for refusing bail, although coupled with other factors may justify a refusal of bail.
- (d) Accused's failure to surrender to bail on previous occasion will by itself be a good ground for refusing bail.
- (e) Interference with prosecution witnesses. Where there is a likelihood of the accused interfering with prosecution witnesses if he is released on bail, bail may be refused, but there must be strong evidence of the likelihood which is not rebutted and it must be such that the court cannot impose conditions to the bail to prevent such interference.

It therefore, follows that the court, in exercise of its discretion under section 123(1) or (3) of the Criminal Procedure Code, in considering the accused's constitutional right to bail, it does not do so in the abstract but also considers the factors I have outlined above. In the light of this it cannot be said that granting or refusing one accused bail where his co-accused jointly charged are granted or refused bail is treating the accused in a discriminatory manner contrary to section 82 sub-section (2) of the Constitution.

I further agree with the learned Principal State Counsel that the meaning of the phrase "discriminatory" in section 82, sub-section (2) of the Constitution is not the same as the natural or ordinary meaning of the word "discriminatory". The word has been assigned a special meaning as stated in section 82, sub-section (3), which reads as follows:

- “(3) In this section, the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

The expression “discriminatory” is, therefore, here used in a special restrictive manner and is specially defined by section 82, sub-section (3).

I should point out here that great emphasis was placed on the argument that the applicant was treated in a discriminatory manner which was confusing as this was not an appeal from the decision of the court below refusing bail. It is a fresh application for bail pending trial. Be that as it may, the applicant does not fall within any of the discriminatory categories in sub-section (3) of section 82 of the Constitution. In the circumstances, to refuse the applicant bail will not amount to treating him in a discriminatory manner contrary to section 82(2) of the Constitution.

This application has come before this court under section 123(3) of the Criminal Procedure Code which empowers the High Court in any case to direct that any person may be admitted to bail or that the bail required by a subordinate court or police officer be reduced.

I have considered the third accused’s application for bail and found that the fact that the first co-accused is out on bail does not constitute a discriminatory treatment of the applicant as to offend section 82 sub-section (2) of the Constitution of Kenya. When the first co-accused was granted bail he was charged with a misdemeanour i.e. conspiracy to defraud contrary to section 317 of the Penal Code and even when that charge was substituted with the more serious charge of the conspiracy to commit the felony of stealing contrary to section 393 of the Penal Code, the court did not have to cancel the first accused’s bail if it was safe to let the first co-accused remain out on bail. That by itself did not create an automatic right for the applicant to be let out on bail and since that is what has been made the basis of the present application, no merits or circumstances justifying the granting of bail have been advanced. The charge which the applicant faces with his co-accused is most serious and the Principal State Counsel has informed the court from the Bar that further investigations indicated a likelihood of further charges and there has been attempts by the applicant through agents to interfere with

prosecution witnesses. The date set for trial, though said to be tentative, is in my opinion, reasonably soon and there is no delay in the trial.

The reasons I have given coupled with those put forward by the Principal State Counsel opposing the grant of bail compel me to find that bail ought not to be granted to the applicant. In the result the applicant is refused.

For the appellant:

Mr Karanja

For the respondent:

Mr Chunga

OCHIENG V UGANDA

NO. 41 OF 1968; [1968] LLR 269 (CAU)

[1] Constitutional Law – Fundamental Rights and Freedom – Right to personal liberty – whether detention of a witness in custody pending investigation into a crime is a violation of the right to personal liberty.

Editor's Summary

The appellant was convicted of murder on evidence of a confession made to the police while he was in custody but before he was charged in court.

The murder took place in 1 March 1967 at a factory and all the workers present including the appellant were taken in custody as possible witnesses. The appellant was arrested on 11 March 1967.

The appellant appeals against the decision because it largely depended on a confession made after he had been kept in custody but without being taken to court or charged of the offence.

Held - There is no right to take a witness into custody pending an investigation into crime. This is a complete disregard of a citizen's right to personal liberty.

The right to personal liberty is entrenched under article 19 of the Uganda Constitution and the same provides that no person shall be deprived of personal liberty save as may be authorised by law.

The circumstances under which a person may be deprived of personal liberty does not include taking a witness into custody pending an investigation to crime.

Voluntary confession is acceptable to court even if the necessary safeguards provided for in law had not been carried out.

The appeal was however dismissed in view of the voluntary confession that had been made by the appellant.

Case referred to in judgment

(“A” means adopted; “AL” means allowed; “AP” means applied; “APP” means approved; “C” means considered; “D” means distinguished; “DA” means disapproved; “DT” means doubted; “E” means explained; “F” means followed; “O” means overruled)

Njuguna s/o Kimani v Reg (1954) 21 EACA 316

Judgment

LESTANG AP, DUFFUS AVP AND SPRY JA: 16 October 1968. The following considered judgment of the court was read on behalf of Duffus AVP: The appellant and Manuel Okech were jointly charged and convicted for the murder of Emilio Scarfidi on 1 March 1967. The appellant was sentenced to death but his co-accused Manuel Okech was found to have been under the age of eighteen years on the date of the commission of the offence and was accordingly ordered to be detained in safe custody under the provisions of section 297 of the Criminal Procedure Code. The co-accused Okech has not appealed.

The deceased, an Italian, was employed at the Universal Asbestos Company as a supervisor of the pipe plant. The appellant was employed in the same factory as a machine operator. It is the Republic's case that the appellant hired the first accused Manuel Okech to carry out the murder which occurred at the factory of Universal Asbestos Company at Tororo at about 8:30pm on the night of 1 March. The appellant was at that time along with other persons working on the night shift at the factory. The evidence established that the appellant telephoned the deceased to come to the factory, as there was something wrong with the machinery. The prosecution alleged that this telephone call was a false report done as a part of the murder plot for the purpose of getting the deceased to the factory where the first accused was lying in wait to kill him. At any rate the deceased did come to the factory apparently as a result of this telephone call. There is a dispute as to whether the deceased did any work on the machine but it is agreed that after a few minutes in the machine room he left and then shortly afterwards returned to this room holding his neck and crying and bleeding from a cut wound on the left side of the neck and chin; he fell down and died on the spot. The wound, which was caused by a sharp cutting instrument, severed the muscles of the left side of his neck and damaged his left carotid artery. Death was due to bleeding from this artery. There can be no doubt that this injury was deliberately inflicted and that the deceased was murdered inside the factory compound. There was a trail of blood leading from his body in the machine room through the fibre store to the main sliding door to the yard where apparently the attack took place.

There were no eye witnesses, and the Republic's case against both the appellant and the first accused depended largely on their individual confessions along with other circumstantial evidence implicating both accused persons in the murder.

The first accused has not appealed but it is necessary in this appeal to consider all the evidence at the trial including that against the first accused.

The first accused is alleged to have made three different confessions. The first of these confessions was alleged to have been made to John Othieno on 6 March 1967. The second confession was made to Inspector of Police Obran on 10 March 1967, when he had gone to investigate the report that had resulted from the alleged confession to John Othieno. The Inspector recorded the first accused's statement in his notebook and the learned trial judge admitted this in evidence. The third statement was to Lazarus Opoya, now a merchant but at the time of the investigation a Sergeant of Police stationed at Tororo. This statement was taken in Dhopodhola language the language of the first accused. This statement was admitted in evidence after a trial within a trial had been held.

In his statements the first accused admitted that he struck the fatal blow but stated that this was done at the behest of and with the assistance of both the appellant and John Othieno. The learned judge did not accept the evidence of Othieno whom he found to be "a dishonest witness who was making contradictory statements in the same breath." The trial judge accepted that both the confessions to the police were voluntary and were properly admissible in evidence, and found the confessions to be true and to have been corroborated by other material and independent evidence. The independent evidence to which he referred were (a) the fact that the first accused after making his first statement to the police took the police to the factory and showed them the exact place where he had killed the deceased and where he had hidden and how he escaped; (b) that the first accused had been seen on the night of 27 February with the appellant at the factory, and (c) that he had mentioned certain material facts in his statement concerning the plot to kill which clearly showed his complicity in the plot. These facts were (i) that he knew that Osendo was concerned with the appellant in the plot to kill the deceased; (ii) that the appellant had attempted to get one Massimiliano Owori to do the killing, and (iii) that the appellant had made a telephone call to the deceased in order to bring him to the factory for the murder to be committed.

In his evidence the first accused completely denied having anything at all to do with the murder. He admitted signing the notebook and the four sheets of his last statement but stated that he was forced to do so after prolonged beating and questioning and because he was frightened.

The learned trial judge accepted the prosecution's case and rejected the defence and convicted the first accused of murder.

The case against the appellant depends again largely on a confession to the police made while he was in custody. This confession was made after he had been kept for some nine days in custody without apparently having been taken to court or charged for the offence. This point was stressed by Mr *Dalal*, his advocate, in submitting that his confession had not been a voluntary

confession and should not have been received in evidence. It will be necessary to examine the evidence on this matter in some detail.

The murder took place on the night of 1 March 1967, and it appears that the police took all the workers present at the factory that night to the police station. This was not unreasonable having regard to the fact that the murder did appear on the face of the known facts to have been an “inside” job. However, it appears that the police continued to keep all these possible witnesses in custody for some days. The witness, Mr Anson, who was no longer in the police force when he gave evidence but was at the time of the murder an Assistant Superintendent of Police attached to the Central CID in Kampala, stated that the witnesses including the appellant were kept in custody, although some were allowed to go away from time to time. He said the appellant was kept in custody until the 11 when he was arrested. No attempt was made by the prosecution to correct Mr Anson’s evidence and we must accept that this did occur. This procedure appears to show a complete disregard of a citizen’s right to his personal liberty. This right had always existed in Uganda but it is now entrenched in the Constitution of Uganda. Article 19 provides that no person shall be deprived of his personal liberty save as may be authorized by law. This article then proceeds to set out the various cases in which this can be done. These cases do not include a right to take a witness into custody pending an investigation into a crime. If witnesses are to be kept at a police station then it must be done with their consent and not by force. If it is desired to detain a person against his will then his detention must be authorized by law, and after a person is so detained or arrested then he must be informed as soon as reasonably practicable, and in a language that he understands, the reason of his arrest or detention and if he is arrested or detained for the purpose of bringing him before a court on execution of the order of the court or on a reasonable suspicion of his having committed or been about to commit a criminal offence under the Laws of Uganda then he shall be brought without undue delay before a court. These are the safeguards and rights set out in our Constitution, but apart from these we would also refer to the provisions of the Criminal Procedure Code (Chapter 107), which provides when a police officer may arrest without a warrant and also provides the procedure to be followed when this is done. We would in this respect refer to sections 23, 27, 30 and 31 of the Code.

The appellant, along with the other witnesses, was taken to the police station on 1 March and according to the appellant he was kept outside, near a counter, until 6 March when he was put into a cell until 13 March when he was first taken before the court. The prosecution’s case shows that he made a statement at midnight on 1 or 2 March 1967 in which he denied any complicity in the murder, and then he made no further statement until 10 March 1967 when he started to make the series of statements admitting his

complicity in the murder. The first was made to Detective Corporal Omoding on 10 March. This was ruled inadmissible as the judge found that the appellant was in custody and had not been cautioned before he made that statement. As a result of what he said to Omoding, the appellant was then seen by Assistant Superintendent of Police Anson. Anson cautioned him and he made a verbal statement which the judge admitted in evidence. Anson then referred the case to Sergeant Opoya who charged and cautioned the appellant and took down a written statement from him in Dhopodhola language. This statement was admitted in evidence after a trial within a trial. It is clear that the appellant was kept in custody from 1 March 1967 and that he does not appear to have been charged until 11 March 1967 and taken before a magistrate on 13 March 1967. It does, however, appear that in this case the police would have had reasonable grounds to suspect that he was a party to the murder, and might have been justified in arresting him without a warrant on 1 or 2 March. We would refer to the fact that the murder had occurred on the factory premises where he was and there was evidence to show that he had caused the deceased to come to the factory on a false report, and then that he had denied this in his statement.

The fact that the necessary safeguards provided for by law had not been carried out following his arrest would not of itself prevent a voluntary confession of guilt by an accused person being accepted as evidence against the person provided that the judge had properly directed himself on the law and on the facts and had especially borne in mind the possible effect that the prolonged detention might have had on the mind of an accused.

The learned judge considered this aspect of the case. He refers in his ruling on the confession made to Anson to the appellant's advocate's submission on this point and also on the question as to whether the appellant had been questioned on several occasions during his detention. The judge also dealt with the allegations made by the appellant that he had been beaten. In the end he accepted the prosecution's case and found that the statements made by the appellant to Anson and the written statement to Opoya had been freely and voluntarily made after proper caution.

Mr *Dalal* relied on the case of *Njuguna s/o Kimani v Rep* (1954) 21 EACA 316. That case which has repeatedly been cited with approval in this court, is authority (*inter alia*) for three propositions:

- (a) That it is highly improper for the police to "keep a suspect in unlawful custody and prolong their questioning of him by refraining from formally charging him;

- (b) That the judge has a discretion to exclude a statement which has been obtained by improper means, even though it is not inadmissible under any specific rule; and
- (c) That a formal caution is of little significance when “given to a prisoner who has been in the police officer’s custody for weeks, and who has previously been induced by questioning to incriminate himself.”

In the present case, the appellant had been wrongfully held for nine days and claims that he had repeatedly been interrogated. The learned judge made no express finding on this claim, but he did consider it. We have given anxious consideration to the question whether, on the principles set out in Njuguna’s case (1), the confession ought not to have been excluded. However, after considering all the circumstances and having regard to the fact that the learned judge applied his mind to the relevant considerations, we are not prepared to say that he was wrong in admitting the confession.

The appellant’s statement to Corporal Omoding was not admitted but his evidence that he called him and spoke to him was, and then followed his report to Assistant Superintendent Anson and then Anson’s conversation with the appellant and the written statement taken by Sergeant Opoya on Anson’s directions. These were all in effect a continuous act and were not really separate confessions but the various acts did explain how the appellant came to make his final written statement to Sergeant. Opoya and supported the prosecution’s case that this was a voluntary confession. In his judgment the trial judge considered the full and detailed statement given by the appellant to Sergeant Opoya and came to the conclusion that this statement “cannot but be true”.

The judge looked for corroboration of the appellant’s written confession and he found this in:

- (a) His oral statement to Anson that Osendo had approached him with the plan to kill the deceased;
- (b) The fact that the appellant had been seen with the first accused in the pipe plant on 27 February;
- (c) That Osendo at the time the deceased was found dead had held the appellant by his arm and said “tell him what happened”.

In this respect, as we have already said, the oral confession to Anson, whilst evidence in support of the fact that the written statement was genuine and voluntary, was in effect one continuous act and this should not be considered as corroboration of the facts stated in his written confession. We also considered that the words used by Osendo could have but little if any weight, as evidence against the appellant. Osendo was not called and, although the

witness who described this incident gave evidence of what Osendo did, he gave no evidence as to the appellant's reaction to this rather cryptic remark. The fact, however, that the appellant had been seen with the first accused at the factory on 27 February 1967 was definitely corroboration, especially as this is denied by the appellant in his evidence but was fully referred to in his written confession.

There is also the evidence of Massimiliano Owori, to the effect that the appellant saw him on 15 October 1966 and said he wanted to kill a foreigner at the factory who had given him a lot of trouble. This happened some 4½ months before the murder, but the trial judge accepted this evidence and this fact is also mentioned in the first accused's confession and was one of the factors relied on by the judge in accepting that the first accused's confession was true. It must be noted here that the judge correctly directed himself on the weight to be placed on the confession of each accused in so far as it involved the other accused person. He did not rely on this as evidence to convict the other accused person.

Then there is evidence of the appellant's telephone call which brought the deceased to the factory. This was very important and vital evidence because, if this was a false report done in order to bring the deceased to the factory, then there was direct evidence of the appellant's complicity in the plot to kill and evidence most materially corroborating the appellant's confession of guilt. Both the assessors accepted that this telephone call was a false report and a trap to kill the deceased. The trial judge has not dealt with this aspect as fully as he might have done but the fact that he accepts the prosecution's case and finds the appellant guilty must in our view mean that he accepts that this telephone call is so and is also borne out by the fact that the appellant completely omits any reference to this telephone call or of any defect to the machinery in his statement to the police on the night of the incident. In that statement he said that he told the deceased that there was nothing wrong with the machinery.

We are of the view that on the evidence accepted by the trial judge that he must inevitably have come to the conclusion that the appellant was guilty of murder, and accordingly we dismiss the appeal.

For the appellant:

Mr SH Dalal

For the respondent:

Mr S Manyindo

OGUTU AND ANOTHER V OKUMU
NO. 15 OF 1982; [1982] LLR 5981 (HCK)

[1] Constitutional Law – Fundamental Rights and Freedoms – Right to personal liberty – personal liberty of a wife as against husband under customary law – Whether a court order requiring wife to return to ex-husband infringes on the fundamental rights and hence unconstitutional.

Editor’s Summary

The first appellant was the father of one Rose, who was married to the second appellant in 1963 and bore him one child. About ten years later, Rose left the second appellant and began to live with the respondent as husband and wife, bearing the respondent two children. In 1981, the second appellant, together with three police officers, took Rose and her three children back to her father, the first appellant.

In a dispute between the appellants and the respondent before a district magistrate’s court in which dispute Rose was not named as a party, the court, purporting to be guided by Luo customary law, ordered the return of Rose and her three children to the respondent.

The appellants appealed against the order.

Held – The court order requiring the wife to return to her ex-husband infringes on the fundamental rights and personal liberty of the person contrary to Chapter V of the Constitution.

An adult is free to choose their place of residence; it is not within the courts’ jurisdiction to make an order which determines where an adult should reside.

The courts of justice are to be guided by African customary law in civil cases in which one or more of the parties is subject to or affected by, so far as is applicable, provided that it is not repugnant to justice or inconsistent with any one written law. In this instance the custom requiring the ex-wife to be returned to her husband was contrary to the Constitution and was repugnant to justice.

When the courts are making orders that affect children, the issue should be considered separately and the best interests of the child must be given paramount consideration.

Cases referred to in judgment

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means considered; “**D**” means distinguished; “**DA**” means

disapproved; “DT” means doubted; “E” means explained; “F” means followed; “O” means overruled)

East Africa

Republic v Kadhi, Kisumu ex parte Nasreen [1973] EA 153

United Kingdom

R v Jackson [1891] 1 QB 671

Judgment

SCHOFIELD J: Ndanui Ogutu and *Joshua Okita* have appealed against a decision of the district magistrate, Rongo, ordering the return of Rose Akeyo and her three children to *John Okumu* (the respondent).

Ndanui Ogutu (appellant number 1) is the father of, and *Joshua Okita* (appellant number 2) is the former husband of, Rose Akeyo.

The appellant number 2 married Rose in 1963 and they lived together until 1973. She bore him one child. In 1973 there were matrimonial differences and sometime during that year Rose Akeyo left the second appellant. The respondent said that he married Rose in April 1973 and it is not disputed that they had been living together as man and wife until 22 October 1981 when the second appellant together with three police constables took Rose back to her father. Rose has had two further children by the respondent and she was ordered to take all three children along with her to her father's home.

There is a dispute between the respondent and defendant number 1 over whether dowry had been paid and the learned magistrate in his judgment apparently considered that insufficient dowry had been paid, if any at all, because he included in his order an order that the respondent give Rose's father more dowry.

The learned magistrate rightly pointed that the respondent and Rose had been living together as man and wife for nine years and that they had during that period produced two children and had looked after those two children and Rose's child by her former union, together. The learned magistrate ordered the return of Rose and three children to the respondent and it is against that order that the appellant now appeals.

The merits of the case were urged before me, but I do not need to consider the question of who Rose Akeyo is married to, or whether dowry was properly paid by the respondent. More fundamental questions are involved requiring consideration of the fundamental rights and personal liberty of a wife. My researches have revealed one case in which was considered the

issues involved in this case: *Republic v Kadhi Kisumu ex parte Bazreen* [1973] EA 153. I need only to quote the head note:

“The interested party and the applicant were Muslims and husband and wife.”

The interested party applied in the Kadhi’s Court for an order for restitution of conjugal rights which was granted. Thereafter on his application the applicant was arrested and brought before the resident magistrate.

The applicant then applied for an order for certiorari to quash the order of the Kadhi’s Court on the grounds, firstly that the Kadhi’s Courts have no powers of enforcement, that there is no power to order the return of a wife to her husband, that the order infringed the applicant’s constitutional right to personal liberty and freedom of movement and finally had the effect of unconstitutionally holding her in servitude.

SCHOFIELD J: Of course the present case does not involve Muslims governed by Mohammedan Law. The learned magistrate was dealing with jealousy and his order was purported to be made in accordance with Luo Customary Law.

Section 3(2) of the Judicature Act (Chapter 8) reads:

“The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue delay.”

The order of the learned magistrate was repugnant to justice in that the decision affected a person who was not made a party to the proceedings. It is contrary to natural justice, for a decision to be made adversely affecting the rights of an individual without that individual being given the opportunity to be heard by the court.

Furthermore, following *Republic v Kadhi Kisumu ex parte Nazreen* (*supra*), the decision of the learned magistrate was inconsistent with the written law in that it contravened Rose Akeyo’s rights which are cited in Chapter V of the Constitution.

It is right and proper for Rose Akeyo to reside with the man she has lived with for nine years and by whom she had two children, if she wishes to reside with him. That is her fundamental right, as granted by the Constitution, and it is not within the court’s jurisdiction to make an order which determines where an adult should reside, in such circumstances as these. Rose Akeyo is free to come and go, and to reside where she pleases.

The order of the magistrate also related to three children. It seems that part of the order was not separately considered taking the interests of the children as the paramount consideration.

For the above reasons the appeal is allowed and the orders of the district magistrate are set aside.

This does not mean that *Ndanui Ogutu* and *Joshua Okita* have a right to detain Rose Akeyo. It appears from the proceedings in the lower court that she wants to live with *John Okumu* whom she regards as her husband. She is free to do so in accordance with her constitutional rights. I do not know what powers the police or the second appellant were purporting to exercise when they forcibly removed Rose from the home of the respondent. I understand that Rose is once again staying with the respondent and if either of the appellants or the police seeks to forcibly remove her from the place where she chose to stay then they may render themselves liable to criminal charges.

Appeal allowed. In the circumstances I will make no order as to costs.

For the appellants:

Mr Joshua Okita

For the respondent:

Mr John Okumu

OKELLO V REPUBLIC

NO. 8 OF 1986; [1986] LLR 5983 (HCK)

[1] Constitutional Law – Fundamental Rights and Freedoms – Rights to a fair trial of an accused person as enshrined under section 77 of the Constitution – Whether ordering accused person to conduct his defence without inquiring into their ability or readiness to do so is an infringement to the right to a fair trial.

Editor's Summary

The appellant had been charged with 3 counts of robbery. The appellant had been represented by Counsel at the commencement of the trial but was ordered to conduct his own defence upon his advocate failing to attend court.

Appellant was convicted of all counts and has now appealed.

Held - A court ought not and must not hurry to conclude a case without due regard to the rights of an accused or without any due consideration as to what the ends of justice demand. It was a breach of section 77 of the Constitution for the trial magistrate to order the appellant to conduct his own defence without first inquiring whether or not he was prepared and able to do so.

No cases referred to in judgment

Judgment

BOSIRE J: The appellant, Samwel Owino Okello, was convicted of three counts of robbery contrary to section 296(1) of the Penal Code, by an Ag Resident Magistrate Makadara, Nairobi and was sentenced to concurrent sentences of 6 years imprisonment. He was also ordered to suffer three strokes of the cane on each count. His appeal attacks the convictions and the sentences.

On 24 June 1985 at about 12:30pm Isaack Maina Kabuagi (PW1), the Managing Director of Kabuagi Petrol Station and Standard Equipment Limited, had collected from the former business, a total sum of KShs 83 000 for banking purposes. He divided the money into three portions, giving his son James Kariuki Maina (PW6) KShs 21 655 30; his employee Patrick Khisa Marombo (PW2) KShs 29 617 30, while retaining KShs 31 580 80. PW1 drove from Kabuagi Petrol Station, to Standard Equipment Limited, from where he intended to get a security guard to accompany him with the two men with him, to the bank. As they were ready to drive off from Standard Equipment Limited compound, they were suddenly descended upon by a gang of three men who were armed with a pistol or what appeared like a pistol, were ordered out of motor vehicle KQS 146, and were

stripped of all the money. The gangsters escaped in that car. Police were contacted who arrived soon after the gangsters had escaped.

Gerison Albert Herman Otieno Yongo (PW7), a resident of Dandora Phase VI Estate, and an employee of Standard Equipment Limited, was at the scene of the robbery when it happened. He testified that he was able to identify the appellant as one of the three men who robbed PW1, PW2 and PW6. On 25 June 1985 he allegedly saw the appellant at Dandora with two other men. He played sleuth by trailing the men who boarded a vehicle to the City Center, and another to Kabete and back to Dandora. At Dandora, he said he saw the appellant enter a certain house which he noted and later led the police there from where the appellant was arrested.

Jane Nkatha (PW5) testified that she had seen the appellant with two other people near the scene of the robbery minutes before it occurred. However she did not witness the robbery. She picked the appellant in an identification parade which was conducted on 26 June 1985. Her evidence is however, of no probative value having not witnessed the robbery.

The crux of submissions by Mr *Onyango Otieno*, for the appellant was identification. The trial magistrate relied on the testimony of the three complainants and that of PW7 to convict the appellant. The offences were committed in broad daylight.

However, the circumstances under which they were committed were such that the identification of the appellant required to be tested. The only way this would have been done was by the holding of an identification parade with the appellant as the suspect and the complainants as the identifying witnesses. The police did not consider this appropriate. Instead they made PW5 the identifying witness. As I said earlier her testimony has no probative value.

The failure of the police to present the three complainants as identifying witnesses in the parade conducted on 26 June 1985 weakened the complainants' evidence of identification. The dock identification by the three complainants, of the appellant, did not suffice, the robberies complained of having been sudden and also having taken a very short time as not to have provided the victims ample opportunity of observing their assailants.

Both PW2 and PW3 testified that they could clearly remember the person who confronted PW1. With due respect to them that could not have been possible considering the fact that they were also victims of other robberies at the time PW1 was being robbed.

PW1 evidence is suspicious considering his conduct and the fact that part of it was contradicted by other evidence adduced. He testified that he became aware of the appellant's arrest 4 or 5 days after the robberies. Yet he on 26 June 1985

approached PW5 with a request that she be an identifying witness in an identification parade the police had intended to conduct. It is not clear how he knew PW5 had some information which would connect the appellant to the commission of the three robberies.

The evidence of PW7 was crucial in the prosecution case. He was not one of the victims of the robbery. He was about 20 feet away while the robberies were in progress. He observed the gangsters in the course of the robberies and was quite able to see the clothes they had on. Later the same day he played detective by trailing the appellant from Dandora to Kabete, and the appellant and another back. From the information he supplied the appellant was arrested and a toy gun recovered in his house. His evidence was clearly significant. However, there are lapses in the conduct of the trial which totally rendered nugatory PW7 testimony.

The appellant was represented by counsel when the hearing of his case commenced on 27 September 1985. Evidence of three prosecution witnesses was taken before the case was adjourned. At the resumed hearing of the case on 10 December 1985, the appellant's counsel did not attend; nor did he send any message as to the reason for his failure to appear to defend the appellant. The trial magistrate was not impressed by that conduct, in my view, with justification.

However, the step he took next was not consonant with the provisions of the Constitution (section 77 of the Constitution of Kenya). He ordered that the appellant conducts his own defence without first asking him whether or not he could or was prepared to do so. The case therefore proceeded with the appellant conducting his own defence.

This was clearly an error on the part of the trial magistrate. A court ought not and must not hurry to conclude a case without due regard to the rights of an accused or without any due consideration as to what the ends of justice demand. In the circumstances of this case it is now not possible to ascertain the extent of prejudice caused on the appellant by the failure of the court to inform him of his rights or at least to comply with the requirements of natural justice. For that reason I am not satisfied the appellant's conviction are safe.

Accordingly I will quash them, set aside the sentences passed on him, and order his immediate release unless otherwise held under other lawful warrant. Order accordingly.

For the appellant:

Mr JW Onyango Otieno

For the respondent:

Mr A Haq

OKIRING AND OTHERS V ATTORNEY GENERAL

NO. 88 OF 2005; [2005] LLR 19 (HCU)

[1] *Constitutional Law – Protection and promotion of fundamental and other human rights and freedoms – Protection of persons liberty – Whether confinement of a person in custody for more than 120 days constitutes violation of personal liberty order article 23(6)(b) of the Uganda Constitution.*

Editor's Summary

The brief facts of the case are that the applicants were charged with treason under the military law before a general court martial.

The applicant applied for bail but was rejected and a 2 bail application is still pending. The applicants have spent more than 2 years in jail without trial.

They are now seeking orders that they be released on bail and be compensated for unconstitutional detention.

Held – The applicant's bail application is allowed under the Constitution in view of expiry of the 120 days. The applicants are not entitled to compensation since their detention was in exercise of judicial power.

Cases referred to in the ruling

(“A” means adopted; “AL” means allowed; “AP” means applied; “APP” means approved; “C” means considered; “D” means distinguished; “DA” means disapproved; “DT” means doubted; “E” means explained; “F” means followed; “O” means overruled)

East Africa

Aliphusadi Matovu v Uganda miscellaneous criminal application number 15 of 2005 (UR)

Bwanika Godfrey v Uganda criminal miscellaneous application number 23 of 2004 (UR)

Byaruhanga Rugyema v Uganda criminal miscellaneous application number 87 of 1998 (UR)

Denis Obua Otimu v Uganda criminal application number 18 of 2005 (UR)

Garuhanga Joseph v Uganda miscellaneous application number 3 of 2004 (UR)

Ismail Serugo v Kampala City Council and Attorney General Supreme Court of Uganda constitutional appeal number 2 of 1998 (UR).

Joseph Tumushabe v Attorney General (supra) Court of Appeal constitutional petition number 6 of 2004 (UR)

Joseph Tumushabe v The Attorney General constitutional petition number 6 of 2004 (UR).

Kyamanywa Jonathan v Uganda criminal miscellaneous application number 38 of 2003 (UR),

Muramuzi Charles v Uganda [1998] LLR 8 (SCU) (UR)

Uganda Law Society and another v Attorney General Court of Appeal constitutional application number 7 of 2003 (UR)

Ruling

KASULE J: The applicants seek an order to be released on bail and that compensation is paid to each one of them for the unconstitutional detention.

The Court is being moved for the above orders under articles 23(1), (4), 6(a) and 50(1) of the Constitution. The applicants are charged with treason, under military law, before a General Court Martial.

The General Court Martial remanded the applicants on 16 April 2003. They applied for bail, but the Court rejected the application. Another bail application number 010 of 2004, lodged on 17 December 2004, remains pending to date without having been determined.

This application comes to this Court after the Constitutional Court determined *Joseph Tumushabe v The Attorney General* constitutional petition number 6 of 2004 (UR).

In the petition, Joseph Tumushabe, a human rights activist, petitioned for, among other reliefs, a declaration in respect of the applicants in this application, that the act of the General Court Martial of the UPDF of keeping the appellants in custody for a period exceeding 360 days without entertaining their bail application and releasing them on bail contravened the Constitution. By a majority judgment, the Constitutional Court held (Byamugisha JA dissenting), in the lead judgment of Twinomujuni JA that:

“The applicants were under article 23(6)(b) of the Constitution entitled to be released on bail after 120 days from the date they were remanded in custody by the General Court Martial; and that the act of the respondent in keeping them in detention beyond that period is unconstitutional.”

And further on after considering article 139 of the Constitution, the Court stated:

“It is clear from this provision that the High Court has original jurisdiction in all matters civil or criminal. The fact that Parliament may confer jurisdiction in any matter to another subordinate court cannot oust the Jurisdiction of the High Court in the matter. The fact that Parliament in its wisdom through UPDF Act confers

jurisdiction in certain cases to the General Court Martial does not oust the Jurisdiction of the High Court in such cases.”

The Judgment continued:

“At all material times up to now, the High Court had power to grant bail to the accused persons. We hold that the accused persons have been entitled to bail since they completed 120 days on remand. I declare that they continue to be so entitled.”

Mpagi-Bahigeine JA part of the majority decision was equally emphatic in her Judgment. She stated:

“Needless to state that if there has been a delay in bringing a man to trial as in the petition before us, which would amount to an infringement or violation of his rights the superior civil courts would intervene and admit him to bail.”

Engwau JA also of the majority decision, concurred thus:

“Therefore, they are entitled to be released on bail after the expiry of 120 days. Keeping them beyond that period is unconstitutional. The detainees may apply for another writ of habeas corpus to the High Court for their release on bail, if they so wish.”

Kitumba JA too, added her emphasis to the majority decision. She held:

“The Constitution lays down the minimum standards. In case these standards are not adhered to one may seek redress.”

It is to be appreciated that even CK Byamugisha JA in her dissenting judgment, agreed that the present applicants were entitled to be released on bail. She observed:

“The detainees have been in custody continuously for over 90 days. They should have been freed by their Commanding Officer after that period unless a military Court that was supposed to try them had been convened.”

Mr *Ojakol* for the applicants has urged this Court to grant relief to the applicants by releasing them on bail in accordance with the majority decision of the Court in Constitution Petition number 6 of 2004; and pursuant to articles 50(1) of the Constitution. He has also relied on the authority of:

Ismail Serugo v Kampala City Council and Attorney General Supreme Court of Uganda constitutional appeal number 2 of 1998 (UR).

Mrs *Rwakojo*, learned Counsel for the Attorney General, has strongly opposed the application.

Relying on the affidavits in reply of Mr Henry Luka, Senior State Attorney, Major Moses Wandera, Head of Prosecution, UPDF and Warrant Officer II Simon Namiti Registrar, General Court Martial, she has submitted

that the applicants should exhaust the avenues available to them in the General Court Martial. The applicant's Right to bail has not been violated and the delay for not taking up their bail application is due to a temporary absence of the Chairman of the General Court Martial, who is on study leave in Jinja. The applicants are also not entitled to compensation.

This Court is bound by the decision of the Constitutional Court that a General Court Martial Court is a Court subordinate to the High Court: See *Uganda Law Society and another v Attorney General* Court of Appeal constitutional application number 7 of 2003 (UR) and *Joseph Tumushabe v Attorney General* (*supra*). Court of Appeal constitutional petition number 6 of 2004 (UR). As such this Court, as a Superior Court, in the exercise of its overall original Jurisdiction can and may intervene and provide relief where the subordinate General Court Martial has failed to do so in breach of the Constitution.

The applicants' case in this application is hinged on article 23 of the Constitution. Article 23 Protection of Personal Liberty is an article under Chapter Four of the Constitution Protection and Promotion of Fundamental and other Human Rights and Freedoms.

Article 20(1) under the same Chapter Four of the Constitution proclaims that the Fundamental Rights and Freedoms of the individual are inherent and not granted by the State; and then article 20(2) provides that:

"The Rights and Freedoms of the Individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons."

This Court, as a Court of Law and a Court of Judicature, is enjoined by article 20(2) of the Constitution to respect, uphold and promote the Rights and Freedoms that are embodied in the whole article 23, but in particular article 23(6)(b)(c) and (7) as far as this application is concerned.

Article 50 of the Constitution provides for the enforcement of Rights and Freedoms by Courts. A person claiming that a fundamental or other Right or Freedom under the Constitution has been infringed or threatened is entitled to apply to competent Court for redress which may include compensation.

The applicants have come to this Court under this Article. Their complaint is that since their being charged with treason, and remanded by the General Court Martial on 16 April 2003, to date, is a period beyond the one hundred and twenty days, provided by article 23(6)(b) of the Constitution, as the period under which one accused of an offence can be kept in custody before trial. Beyond this period, the Constitution commands that. "the person shall be released on bail on such conditions as the Court considers reasonable."

The applicants thus pray this Court to release them on bail in accordance with the Constitution. This is the more so, because the General Court Martial has not entertained their bail application which has been pending since 17 December 2004 due to the absence of the Chairman of the General Court Martial.

In *Ismail Serugo v Kampala City Council and Attorney General* Supreme Court of Uganda constitutional appeal number 2 of 1998 Mulenga JSC, held with the concurrence of the rest of the Court, that:

“It follows that a person who seeks to enforce a Right or Freedom guaranteed under the Constitution, by claiming redress for its infringement or threatened infringement, but whose claim does not call for an interpretation of the Constitution has to apply to any other competent Court.”

This Court holds therefore, that as a Superior Court to the General Court Martial, it is competent to entertain this application. It will thus proceed to determine the application on its own merits. At common law a person is said to be admitted to bail when he/she is released from the custody of officers of the law and is entrusted to the custody of persons known as his/her sureties, who are bound to produce him/her to answer, at a specified time and place, the charge against him/her, and who in default of so doing are liable to forfeit such a sum as is specified when bail is granted.

In Uganda from the Trial On Indictments Act, Chapter 23, The Magistrates Courts Act, Chapter 16, and from the practice and procedure of this Court, bail is the release from custody by Court of a person accused of a criminal offence, after such a person has signed a bond, with or without sureties, for a reasonable sum of money, in cash or not in cash, to the effect that he/she is to appear again before Court on a day specified by Court, until the criminal charges against him/her are finally determined.

The justification for the release of a person accused of a criminal offence before the end of his/her trial lies in the presumption of the innocence of an accused person until he/she is proved guilty or pleads guilty to the charge.

This presumption of innocence is now Constitutional as per article 28(3)(a) of the Constitution.

The basic law for bail in Uganda is article 23(6)(a)(b)(c) of the Constitution. Views are varied amongst their Lordships of this Court as to how this article has affected sections 14, 15 and 16 of the Trial on Indictments Act Chapter 23 and sections 75, 76 and 77 of the Magistrates' Courts Act, Chapter 16, and generally the law and practice of Courts relating to bail in Uganda.

In the *Joseph Tumushabe v Attorney General* (*supra*) constitutional petition number 6 of 2004 Twinomujuni JA pointed out the need to review current legislation about bail so as to bring it in conformity with article 23(6) of the Constitution. He observed:

“All other laws on bail in this country that are inconsistent with or which contravene this article are null and void to the extent of the inconsistency. The Attorney General of Uganda needs to take a closer look at sections 15 and 16 of Trial on indictments Act, Chapter 2(3) There may be urgent need to bring them in conformity with article 23(6) of the Constitution.”

His Lordship Judge ES Lugayizi, current head of the Criminal Division High Court, has in a well considered ruling in (arising from Buganda Road Court Original case number 200 of 2005) *Aliphusadi Matovu v Uganda* (UR) miscellaneous criminal application number 15 of 2005 reviewed and considered the current state of legislation on bail and has concluded that:

“In matters under consideration (and in other matters of bail in criminal cases) Court must bear in mind a few important principles. Firstly, that bail is now a Constitutional Right. Secondly, that article 23(6)(a) of the Constitution limit Court’s discretion in such matters to setting “conditions” that would guarantee the return of an accused person to Court to answer the charge against him or her before releasing him/her on bail.”

His Lordship Judge Lugayizi’s above decision seems to support the earlier decision of this Court, (VF Musoke – Kibuuka J) in *Muramuzi Charles v Uganda* miscellaneous application number 10 of 1998 (UR) at Mbarara where the learned judge held that:

“It is therefore my view of the broader provisions of article 23(6)(a) of the Constitution, the narrow provisions of section 14A(1) of the TID which, in its effect, denies the entitlement to apply for bail, to an accused person, unless the applicant suffers from grave illness or is of an advanced age or is an infant, is totally unconstitutional as it directly conflicts with the provisions of articles 23(6)(a) of the Constitution.”

According to these two decisions, the relevant considerations required to be considered by Court in a bail application according to article 23(6)(a) are only those stipulated in section 15(1)(b) and (4)(a)(b)(c) and (d). The rest of the considerations in the section are *ultra vires* the Constitution and therefore are null and void.

The other of some their Lordships of this Court hold the view that the issue of determining conditions for bail, including the category of “Special Circumstances” is within the unfettered discretion of the Court.

In *Byaruhanga Rugyema v Uganda* criminal miscellaneous application number 87 of 1998(UR): Tabaro J stated:

“It is now settled almost axiomatic, that the use of “not” by the draftsman instead of “shall” [in section 14A of TID] confers upon the Court discretion and hence the position is not mandatory – it is not mandatory to refuse bail if the accused fails to establish exceptional circumstances.”

Rugyema’s case (*supra*) was followed by this Court in *Janet Mureeba v Uganda* miscellaneous application number 136 of 1999 (Mukanza J) (UR); in *Kyamanywa Jonathan v Uganda* criminal miscellaneous application number 38 of 2003 (Bamwine J) (UR), in *Bwanika Godfrey v Uganda* criminal miscellaneous application number 23 of 2004 at Jinja, Wangutsi J (UR), In *Garuhaanga Joseph v Uganda* miscellaneous application number 3 of 2004. Okumu Wengi J (UR); and also In *Denis Obua Otima v Uganda* criminal application number 18 of 2005, (UR), where this Court considered article 23(6)(a) and section 15 of the Trial On Indictments Act and concluded that:

“It would appear that section 15 of the Trial on Indictments Act provided more Statutory parameters that the Court has to consider while exercising its discretion in deciding whether to refuse or to grant bail. Similarly the section provides more statutory grounds upon which an accused person charged with the specified offences in the section can base his/her application for bail. The parameters and the more statutory grounds are all constituted in the term “exceptional circumstances” of that section.”

It is hoped that in the near future a higher court will come up with a decision on this point that will bring together the two schools of thought on this law of bail amongst their Lordships of this Court.

In the application before Court the applicants pray Court that they be released because the Constitution so requires under article 23(6)(b) that:

“In the case of an offence which is triable by the High Court as well as by a subordinate Court, the person shall be released on bail on such conditions as the Court considers reasonable, if that person has been remanded in custody in respect of the offence before trial for one hundred and twenty days.”

Each of the applicants has now been on remand for more than two years.

The provisions of the Uganda Peoples’ Defence Forces Act, Chapter 307, under which the applicants are being tried, are in fact very much against keeping the accused in long custody without being tried.

Under section 75 of that Act, the Commanding Officer in respect of an accused who remains in custody for seven days without being tried, must make a report to the authority, convening the military Court to try the

accused, stating the reasons of the delay. This report must continue to be made every seven days.

The section further provides that if an accused person is not tried by the military Court within twenty eight days, then that accused may petition the authority appointed by the President to be released from custody by or for disposal of the case.

It is further provided for in the section, that after a period of ninety days of continuous custody of an accused, unless the trial military Court has been convened, the Commanding Officer must free the accused.

The UPDF provisions of the Act are thus being breached as regards the applicants' continued custody. At the same time the General Court Martial is not sitting due to the absence of its Chairman. It is not stated as to when the General Court Martial will entertain the applicant's bail application which has remained unattended to for now nine months. The applicants have sought the protection of the Constitution as regards their right to be released from custody through this application to this Court.

This Court holds that the applicants have made out a case to be granted bail.

The Court will thus proceed to consider those conditions that the Court considers reasonable for granting bail. Such conditions are aimed at guaranteeing the return of each of the applicants to the trial Court to answer the charges against him until the completion of the trial.

These conditions include whether the accused has a fixed abode within the jurisdiction of the Court or is ordinarily resident outside Uganda, whether there are sound sureties within the jurisdiction to undertake that the accused shall comply with the conditions of bail, whether the accused can make cash deposits to court as cash bail, whether the accused is in possession of a passport or titles of land, or other securities, that can be deposited with Court, whether each of the accused has a family to look after, and whether the accused has national and personal obligations that necessitate him/her to be released on bail. They also include consideration whether the accused has other charges pending against him/her, and/or whether the accused has on a previous occasion when released on bail failed to comply with conditions of his/her bail.

It is a matter of regret that this court was hardly assisted by applicant's counsel with regard to these conditions.

Not even the personal particulars of each applicant as to age, place of birth, place of residence, particulars of work and family obligations were supplied to Court.

No sureties or securities were provided to Court for consideration. The Court is thus left in the dark. Yet the Court must consider and approve or disapprove the same. Failure to supply these particulars at the time of making the application results in wastage of time and other resources of the Court. Counsel for the applicant bears the blame of this. Be that as it may, this Court must give a definitive decision to this application.

The offence of treason is a very serious one with a mandatory sentence of death. This calls for imposition of stringent bail conditions. On the other hand the applicants have spent more than two years without being tried; and in accordance with the Constitution, they ought to have been released from custody more than a year ago. These are factors to be taken in their favour in determining the conditions of their bail.

This Court therefore allows this application by granting bail to each of the applicants, subject to the fulfilment of each of the following conditions:

- (a) Each applicant is to furnish to Court, for consideration and acceptance, his personal particulars.
- (b) Each applicant is to deposit with this Court a cash bail of KShs 1 million.
- (c) Each applicant is to produce two sureties for consideration and approval by this Court.
- (d) Each approved surety is to execute a bond of KShs 15 million not cash.
- (e) Each applicant, with a Passport, is to surrender his Passport to Court.
- (f) Each applicant is to report to the Registrar, High Court, Kampala every 15 of the Month and to the Registrar General Court Martial, every 30 day of the month, commencing from the month of September 2005 until the final determination of the treason charges against each applicant.
- (g) Each applicant is not to travel outside Uganda without the first approval of this Court and that of the General Court Martial.

Counsel for the applicant will, in liaison with the Registrar Crime of this Court, arrange for the appearance of the applicants and sureties before a Judge of this Court for the due consideration and approval, or otherwise, of the above conditions in respect of each applicant.

The applicants claimed for compensation for unlawful detention. This claim cannot be allowed by this Court. The applicants have been and continue to be in remand by order of the General Court Martial. That order is made by that Court in exercise of that Court's judicial power. Article 128(4) of the Constitution bars the applicant's claim: A person exercising judicial power is not liable to any action or suit for any act/omission by that person in

exercise of judicial power. To order compensation to be paid to the applicants is to hold the General Court Martial liable for the detention of the applicants. The Constitution does not allow this. This is to preserve the independence of the Judiciary. The claim for compensation is disallowed. No order is made as to costs.

For the appellant:

Mr Ojakol

For the respondent:

Mrs Rwakojo

ONKOBA V REPUBLIC

NO. 325 OF 1989; [1989] LLR 5976 (HCK)

[1] *Constitutional law – Right to a fair hearing – Interpretation of section 77(2) of the Constitution.*

Editor's Summary

The appellant was convicted of robbery contrary for section 296(2) of the Penal Code on his own plea of guilty.

He now appeals against the conviction and sentence on the ground that he did not understand the language in which proceedings were conducted.

Held – Section 77(2)(b) of the Kenya Constitution provides that the accused person shall be informed as soon as reasonably practicable in a language which he understands and in details, of the nature of the offence charged.

The appellant's plea was unequivocal and the record shows that the magistrate made every possible enquiry and the appellants reply left him no way out.

Appeal dismissed.

Cases referred to in judgment

("A" means adopted; "AL" means allowed; "AP" means applied; "APP" means approved; "C" means considered; "D" means distinguished; "DA" means disapproved; "DT" means doubted; "E" means explained; "F" means followed; "O" means overruled)

East Africa

Adan v Republic [1973] EA 445

Chacha s/o Wamburu v R (1953) 20 EACA 339

Lusiti v Republic [1977] KLR 143

Manguera s/o Msakazi v Republic (1951) EACA 150

Olel v Republic

R v Ibrahim bin Saleh [1921–1928] 1 TLR 69

Tomasi Mufumu v R [1950] EA 625

Wanjiru v Republic [1975] EA 5

Judgment

PORTER AND MBALUTO JJ: The appellant was convicted in the court below of robbery contrary to section 296(2) of the Penal Code and was sentenced to death. He now appeals against conviction and sentence.

This is an unusual case in that the appellant pleaded guilty in the court below, and this being a capital offence both the learned Principal Magistrate and ourselves feel uncomfortable with the situation.

The appellant was arrested on 23 July 1986 the same day of the offence. His apprehension was not reported to court until 8 September 1986 according to the charge sheet. He was apparently in police custody for something like 47 days therefore.

When he came up to court on 8 September 1986 the charge was read to him and he pleaded not guilty to an offence of robbery and to an offence of grievous harm. He was remanded to 22 September 1986, and on that occasion he asked for the charges to be read to him again and this was done, whereupon he pleaded guilty to the first count of robbery.

The learned Principal Magistrate pointed out to him that there was a mandatory sentence of death, and he said that he understood, and still wished to plead guilty because as he said, "I committed the offence."

The matter was adjourned to 26 September 1986 as the prosecutor was caught short by this unexpected turn of events, and on that date the learned Principal Magistrate again asked the appellant if he realized that the death sentence was mandatory, and whether he wished to maintain a plea of guilty. The appellant said, "Yes, I still wish to plead guilty because I know that I am guilty."

The facts were then given by the prosecutor. In brief they were that the deceased worked for Mr and Mrs Nyanga who live in Kericho. She was left alone in the house on the day in question 23 July 1986, looking after the baby. The appellant went to the house at 9:00am and found her in the bedroom with the baby, and cut her throat with a pocket knife. He then started to steal items from the house which he put in a suitcase, and also scattered other items around.

At 9:15am Alice Onkoba, a neighbour went to the house, and heard noise from the bedroom. She saw the appellant coming from the bedroom, and he looked frightened, and his clothes were bloodstained, so she ran away.

The appellant followed her and cut her; she fled and reported to another person who took her to the Police Station.

When the police arrived they found a pocket knife stained with blood and also shoes and shirt which were bloodstained and which belonged to the appellant.

The appellant turned up at 10:00am near Kericho Town Secondary School. The witness who met him thought he looked worried and had

bloodstained trousers, and he was asked by the appellant to fetch water so that he could wash his hands. The witness reported the matter to the headmistress and in the end the appellant was allowed to wash his hands in a toilet in the school while the headmistress rang the police who arrested him there. He was wearing a shirt which was taken from Mrs Nyanga's house.

He was taken to hospital for examination as to his mental state and he was found to be aged 24 and mentally alert and fit.

After these facts were given the appellant said that he understood them and that they were true. However, he explained that his intention was to get his wife Alice Onkoba who had deserted him after he was jailed. He said that he killed the girl while he was struggling with Alice Onkoba.

The learned Principal Magistrate quite rightly entered a plea of not guilty in those circumstances and fixed the matter for hearing. The matter was mentioned on 10 October and on the 23 October the appellant came to court for mention but said, in English this time:

"I still wish to admit the offence of robbery."

The court said:

"But you mentioned the other day that your intention was to capture your wife".

The appellant said:

"That is not true. I wanted to rob that family. I robbed that girl whom I killed those items (sic) like the radio cassette and sewing machine."

The court reminded him that if he was convicted he would be sentenced to death and the appellant said that he understood that and was prepared for it. The Court asked him if he still pleaded guilty to robbery as charged: "Yes I do".

The learned Principal Magistrate then read his record of the facts given on the previous occasion to the appellant and he said, "Yes I admit them as true".

The learned Principal Magistrate in his notes on sentence said the following:

"This accused has pleaded guilty to the offence despite my warning that he would be sentenced to death. He has persisted in wanting to plead guilty. Can the court refuse him from doing so when he himself wants to and fully knows and has been adequately warned about the consequences that flow on him after being convicted? At any rate he committed a ghastly offence which must be haunting him. He slew the young and helpless maid without mercy and should suffer the consequences of it. I sentence the accused to suffer death as provided by the law."

We have noted the conduct of this matter by the learned Principal Magistrate, and we wish to compliment him on the care with which he considered this matter. It is obvious that he was concerned in accepting a plea of guilty on a capital charge, very rightly in our view, and took every chance he could to convert the plea of guilty into a plea of not guilty so that he could have an opportunity of considering the evidence in the matter. We would not wish anything that we have to say in this matter to be construed as a criticism of his efforts.

The appellant now seems to have changed his earlier view, and in his grounds of appeal, submissions in writing, and submissions *viva voce* before us, he has made the following points, which we paraphrase:

- (1) What he committed was murder and he ought to have been charged with it. His admissions were to that effect, and therefore his plea to robbery should not have been accepted. We do not think there is anything in this ground in view of his admissions before the court below.
- (2) That section 296(2) does not relate to cases in which someone is killed, but only to cases in which people are beaten and injured. We do not think that there is anything in this ground either.
- (3) He indicates that he did not really know what was going on in court. But the record showed that the learned Principal Magistrate did everything he could to explain what was happening and what was going to happen, and he answered in clear and uncompromising terms. We do not think from the record that this could be so.
- (4) The appellant raises the question of the language in which the charge was read to him: on the first occasion the record has it that the charge was read in Swahili. He pleaded not guilty. When the charges were read to him a second time, that was also in Swahili. On the third occasion the appellant himself elected to speak in English.

The matter turns on the question of language. The reason for this is that the appellant replied to the charge “Not guilty”, and following *Wanjiru v R* [1975] EA 5, and *Lusiti v R* [1977] KLR 143, that plea required further investigation. However, failure to conduct that investigation can be cured under section 382 of Criminal Procedure Code if the facts are then read out and the appellant agrees to them, providing the facts amount to the offence before the court. That is of no use however unless the appeal court can be satisfied that the appellant understood the facts.

There are other and more basic reasons.

Section 77(2) of the Constitution is the basis for the procedure and the requirements for a person who has been charged with a criminal offence:

- (b) Shall be informed as soon as reasonably practicable in a language which he understands and in detail, of the nature of the offence charged.

We are of the view that this provision relates to what shall be done by the police in the Police Station, so far as normal procedure goes at any rate.

- (f) Shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge.

It should be noticed:

- (1) That the Constitution does not require the language of the trial to be recorded.

And

- (2) That the Constitution does not require the proceedings necessarily to be conducted in the first or home language of the appellant, but in a language he understands.

Section 207(1) of the Criminal Procedure Code provided for the taking of a plea in the subordinate court, but does not refer to interpretation.

The language of the subordinate court are English and Swahili: the language of the High Court is English. One can expect the subordinate Court to proceed in English or Swahili: in practice charges are drawn in English, and the Court usually, although not always, proceeds in that language. Any other languages used are translated to the language of the Court. This usually, although not always, applies to Swahili as well.

In *Adan v Republic* which has become the leading authority on the way to take a plea, it is required that the charge and all the essential ingredients of the offence should be explained to the accused in *his language or a language he understands*.

“The courts have always been concerned that an accused person should not be convicted on his plea unless it was certain that he really understood the charge and had no defence to it. The danger of a conviction on an equivocal plea is obviously greatest where the accused is unrepresented, is of limited education, and does not speak the language of the court.

When a person is charged the particulars should be read out to him, *so far as possible in his own language*, but if that is not possible, then in a language which he can speak and understand.”[Emphasis mine]

It seems to us that the question at the root of all this is the question of whether the appellant understood the charge.

Where it is recorded that there was interpretation at the request of the appellant and into what language there was interpretation and by whom it was done, there is no problem. This is why it is good practice to make a record of such matters.

But of course, when conducting an appeal, this court is bound by the record before it. It must appear from the record that the appellant understood what was being said in the court below.

Now it can be argued that “*omnia esse rite acta praesumuntur*” that is that no magistrate would conduct proceedings in such a way that he was aware of the fact that an appellant did not understand what was going on, but did nothing about it.

But these are cases in which already the magistrate has failed to go further into the matter than a plea of “it is true” or “guilty”, or as in this case “not guilty:” it would be wrong therefore to apply such a presumption.

The question of whether an appellant understood the proceedings in the court below must appear from the record, in order that we may use our discretion under section 382 of the Criminal Procedure Code in support of the conviction.

Since the whole point is whether the appellant understood what was going on, we would not always expect to see an application by the appellant in the court below for interpretation.

But in some cases it is clear from the record that an appellant took an active part in the proceedings, and in others that he did not. In some cases the appellant will add details to the facts given by the prosecutor, or make a sensible plea in mitigation, which often is able to show, from the record, that he understood what was going on.

In other cases the reply to the charge may be “it is true” followed by “agreed” to the question as to whether he admits the facts, followed by nothing in mitigation. Cases like that are of concern: it is from the record that the appellant followed the proceedings in the court below.

That is why it is good practice to record the question of interpretation: if that is done it would be unlikely that the appeal court would decide that although interpretation was provided, it was in a language which the appellant did not understand.

Nor can it necessarily be assumed that any person before the subordinate court can be taken to understand English, any more than he can necessarily be taken to understand Swahili. It all depends upon what appears from the record. As is said in Adan’s case:

“It might be added that while the idea of stealing is one universally known, it does not follow that every language has a word corresponding to the English word “steal” which excludes a taking under a bona fide claim of right.”

In this case there is every indication from the record that the appellant participated in the proceedings to the fullest, even the most remarkable extent, in both Swahili and English. We cannot accept that language played any part or caused any difficulty here.

- (5) The appellant said that he had a “mingle up of mind” in the court below. But he had been medically examined, and found to be mentally alert and fit. The learned Principal Magistrate explained the position to him on repeated occasions it cannot be said that the position was not made clear to him, or that he did not accept it.
- (6) The appellant also said that he was 44 days in Police Custody, and was beaten up during that time. There is nothing in the record to that effect and, bearing in mind the decision in *Olel v Republic* which not only was the decision of a three Judge Bench, but was also a decision of a court which included a member of this court, it would be perverse not to follow it, until it is further considered. The burden of that decision is that if the matter is not mentioned in the court below, then it cannot be mentioned on appeal, and that the court below is not required to look into such long periods of remand in Police Custody before accepting a plea. We do not think therefore that this assists us in this matter.

Those briefly are the grounds put before us by the appellant and we think, for the reasons given, that none of them assist us in this matter. The plea is unequivocal in this case. But we think it right for us to go further yet, as the appellant is unrepresented.

Rosen (as he was then known) and Stratton in a *Digest of East African Criminal Case Law* quote the following cases on this subject:

- “(1) It is undesirable to record a plea of guilty in a capital charge.

R v Ibrahim bin Saleh [1921-1928] 1 TLR 69

And

“There is no statutory provision invalidating a conviction on a capital charge on an accused person’s own plea where it does amount to an unequivocal admission of guilt, but it is generally inadvisable particularly where the accused does not speak English for the Trial Judge to accept a plea of guilty on a capital charge” (this at a time when the only capital charge in normal use was murder, triable before the High Court where the language involved was English.”

Mangwera s/o Msasaki v R (1951) 18 EACA 150

And

“There is no general rule that a plea of guilty should not be accepted from an African in a capital case, but precautions are necessary.”

Chacha s/o Wamburu v Republic (1953) 20 EACA 339.

In *Tomasi Mufumu v Republic* [1950] EA 625, the Court of Appeal for East Africa said in Kampala:

“It is very desirable that a trial judge, on being offered a plea which he construes as a plea of guilty in a murder case, should not only satisfy himself that the plea is an unequivocal plea, but should satisfy himself and record that the accused understands the elements which constitute the offence of murder and understands that the penalty is death.”

We have no doubt in this case that the Learned Principal Magistrate followed, and was aware of, Mufumu’s case and he is to be complimented for that.

It is always open to a magistrate to require the prosecution to prove their case, providing it is a matter which falls within the exception to section 207(2) of the Criminal Procedure Code:

“207(2) if the accused person admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary.”

In this case, final plea was unequivocal. On our own reading of the record we suspect that the learned Principal Magistrate would have liked to direct a plea of not guilty if only he could find a way to do so.

But the record shows that he made every possible enquiry advised by the relevant case law, and the replies of the appellant left him no way out whatever. There is no basis upon which we can interfere with the decision of the learned Principal Magistrate who acted properly and with care throughout these proceedings.

For those reasons, therefore we dismiss the appeal.

For the appellant:

Information not available

For the respondent:

Information not available

PATEL V PREMJI

NO. 61 OF 1975; [1975] LLR 4512 (CAK)

[1] *Constitutional Law – Fundamental Rights and Freedoms – Freedom of religion and conscience – Whether court can adjudicate on internal matters of religious organisation.*

Editor's Summary

The appellant appeals against the decision of the High Court dismissing his application for injunctive reliefs against a member of their Religion.

High Court dismissed the application as misconceived.

Held - Section 78 of the Constitution of Kenya guarantees freedom of conscience and courts in Kenya will not interfere in matters of religion and conscience provided no breach of Laws of Kenya is involved.

No Cases referred to in judgment

Judgment

LAW VP: The appellant represents a Nairobi temple which follows the religious principles of the Shree Swaminarayan sect, and is under the seat of *Nar Narayan Dev* at Bhuj Ahmedabad in India.

The respondent represents a Mombasa temple, which is also pledged to follow the Swaminarayan religion, under the guidance of the *Nar Narayan Dev* at Bhuj Ahmedabad. These two temples are separate and distinct legal entities registered under the Societies Act, but have similar Constitutions, extending reciprocal membership to each other.

There is another Swaminarayan temple in Nairobi, which I shall call the Temple Road Temple, which the appellant does not recognize as it purports to adhere to both the *Nar Narayan Dev* Seat at Bhuj and the Seat of *Lakshum Naran Dev at Vatal*, whereas it seems to be common ground that a Swaminarayan temple must adhere to one or the other seat, but not to both. The Mombasa temple, however, does recognize the Temple Road and has established religious and social connections with it. In this they have incurred the disapproval and displeasure of the appellant's temple in Nairobi. The appellant accordingly sued the respondent claiming declarations that the Mombasa temple should not recognize the Temple Road Temple or admit to membership members of that temple, and asking for the issue of an injunction prohibiting the respondent from inviting members of the Temple Road Temple to participate in the temple's religious and social functions. After

protracted hearing Sheridan J dismissed the appellant's suit on two main grounds: firstly, that the dispute had been disposed of under an arbitration; and secondly, that the suit was misconceived, which I take to mean either that the appellant had no cause of action, or that the court would not, in the exercise of its discretion, grant the relief sought. I do not find it necessary to deal with the grounds of appeal directed against the arbitration award, as I am fully in agreement with the judge that the appellant's suit was misconceived. I am fortified in this by reference to section 78 of the Constitution of Kenya which guarantees freedom of conscience. Every individual is entitled to follow such religion, and to manifest and propagate that religion in worship, teaching, practice and observance, as his conscience dictates. The courts in Kenya will not interfere in matters of religion and conscience, provided of course that no breach of the laws of Kenya is involved. The courts will not interfere with matters of dogma or ritual and other internal matters within the competence of a church or religious establishment. If the members of the Mombasa temple wish to recognize one or other or both the Nairobi temples, that is entirely a matter of individual choice and conscience for the members of the Mombasa temple, and the Constitution guarantees their freedom of conscience in this respect.

Mr *Bhandari* for the appellant has sought to found a cause of action on the argument that the members of the appellant's temple, in their capacity of reciprocal members, have some proprietary and contractual rights as members of the Mombasa temple. Even if this were so, and it seems doubtful to me, it is clear that the Mombasa temple has not done anything to deprive the members of the appellant's of their reciprocal membership, so that the proprietary rights of the members of the appellant's temple, if any exist, have not been affected by anything done by the members of the Mombasa temple.

Even if the trial judge had jurisdiction to make the declarations sought, to enforce any contractual rights which the members of the appellant's temple might enjoy under the Constitution of the Mombasa temple, he would clearly have refused to exercise his discretion to do so for the reason given by him: that the dispute was primarily one for resolution by the spiritual head of the seat in Bhuj and not a proper subject for litigation in the ordinary courts of Kenya. That would have been, in my view, a proper and judicial exercise of discretion.

On any view of this matter, I agree that the appellant's suit was misconceived, for the reasons I have attempted to set out, and that he has no cause of action in respect of the remedies he seeks, or, if he had such a cause of action, the judge correctly exercised his discretion in refusing to grant the declarations sought. In my view, this appeal fails and should be dismissed, with costs. I would not interfere with the order for costs made in the High Court.

MUSTAFA JA: I agree with the judgment delivered by Law VP. I wish only to add this. The appellant temple is a separate and distinct legal entity from the Mombasa temple, as both are registered societies with their own Constitutions, even if the Constitutions are practically identical. They are under different management bodies, each management body being responsible for the running of its own temple. I do not think that the appellant temple can possibly have any right to tell the Mombasa temple how to run its affairs or conduct its business. Mr Bhandari has submitted that since all the members of the two temples are of the same sect in the same faith, they are or can become members of each other's temples. The reciprocity of membership, however, does not confer on the Nairobi temple any right to interfere in the way the Mombasa temple runs its affairs. It would perhaps be different if the members of the Mombasa temple had asked for the help of the court to interfere with the management body of the Mombasa temple because the management had breached some fundamental provision of its Constitution. The appellant temple, merely because its members have reciprocal rights of membership with the Mombasa temple, cannot have that right. It seems to me that the appellant temple is trying to compel the Temple Road Temple, with which it is in deep disagreement over some doctrinal matters, to alter its Constitution to follow only one Gadi, through exerting pressure on the Mombasa temple. I concur in the order proposed by Law VP.

WAMBUZI P: I agree with the judgment delivered by Law VP and I associate myself with the remarks made by Mustafa JA. Accordingly, there shall be orders in the terms proposed by Law VP.

For the appellant:

Mr Bhandari

For the respondent:

Mr Nar Narayan Dev

PLA AND PUNCERNAU V ANDORRA
NO. 69498 OF 2001; [2004] 2 FCR 630

[1] Human rights – Private and family life - Inheritance rights – Child of beneficiary adopted 20 years after testatrix's death – Andorran courts determining adopted child not a beneficiary – Whether adopted child's right to family life violated – Whether adopted child discriminated against – European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, articles 8, 14.

Editors Summary

The first applicant, who was born in 1966, was the adopted son of the second applicant. The second applicant was married to FX. In 1939, FX's mother (the testatrix) made a will which settled her estate on FX as life tenant with the remainder to a son or grandson of a lawful and canonical marriage. Should those conditions not be met, the children and grandchildren under the settlement would be entitled to the estate. The mother died in 1949. In 1995, FX made a will in which he named the second applicant sole heir to the remainder of his estate. In a codicil of 3 July 1995, FX left the assets he had inherited under his mother's will to his wife for life and to his adopted son, as remainder man. FX's sisters brought a civil action to have the 1995 codicil set aside. On appeal, the High Court of Andorra determined that an adopted child was not a legitimate child or a child of the marriage where there was a family settlement made at a time when under Andorran law adopted sons did not have the same rights as legitimate sons under family settlements. The sisters were declared legitimate heirs of the testatrix. The applicants lodged an application with the High Court of Justice to have the proceedings set aside, but that application was dismissed as ill founded, as was their appeal to the Constitutional Court. The applicants complained to the European Court of Human Rights that in determining inheritance rights, the High Court of Justice and the Constitutional Court had discriminated against the first applicant on grounds of filiation, which amounted to a violation of article 8 taken alone and in conjunction with article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. The government submitted that article 8 was inapplicable as there had been no family life within the meaning of that provision between the applicants and the testatrix since she had died in 1949, and the applicant was not adopted until 1969. It was further argued that the property dispute in the instant case arose as a result of the free will of a testatrix who, under domestic law, had been entirely free to dispose of her property as she wished apart from the portion reserved for heirs and that there was no discrimination under

Andorran law because it did not in any way discriminate between adopted and legitimate children.

Held – It was settled law that the right of succession between children and parents, and between grandchildren and grandparents, was so closely related to family life that it came within the sphere of article 8. Thus matters of intestate succession, and voluntary dispositions, between near relatives were intimately connected with family life. Family life did not include only social, moral or cultural relations; it also comprised interests of a material kind. The fact that the testatrix had died before the first applicant was adopted was no reason for the court to adopt a different approach. Accordingly, article 8 was applicable in the instant case; *Marckx v Belgium* [1979] ECHR 6833/74 and *Camp and Bourimi v Netherlands* [2000] ECHR 28369/95 applied.

Although, the court was not in theory required to settle disputes of a purely private nature, in exercising the European supervision incumbent on it, it could not remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appeared unreasonable, arbitrary, or blatantly inconsistent with the prohibition of discrimination established by article 14. The court's task was confined, therefore, to determining whether the first applicant was a victim of discrimination contrary to article 14 with regard to the Andorran courts' interpretation of the testamentary disposition, since it was agreed that domestic law was compatible with the principle under article 14 prohibiting discrimination on grounds of birth. In the instant case, there was nothing in the will to suggest that the testatrix intended to exclude adopted grandsons. The Andorran courts' interpretation of the testamentary disposition had the effect of depriving the first applicant of his right to inherit under his grandmother's estate. There was no objective and reasonable justification for what amounted to judicial deprivation of an adopted child's inheritance rights. Where a child was adopted, the child was in the same legal position as a biological child of his or her parents in all respects. Moreover, as the Convention as a living instrument and had to be interpreted in the light of present-day conditions, and great importance was attached today in the member states of the Council of Europe to the question of equality between children born in and out of wedlock as regards their civil rights, even supposing that the testamentary disposition in question did require an interpretation by the domestic courts, that interpretation could not be made exclusively in the light of social conditions existing at the time when the will was made or at the time of the testatrix's death. Where such a long period had elapsed, during which profound social, economic and legal changes had occurred, the courts could not ignore those new realities. The same was true with regard to wills; any interpretation should endeavour to ascertain the testator's intention and render the will

effective, while bearing in mind that the testator could not be presumed to have meant what he did not say and without overlooking the importance of interpreting the testamentary disposition in the manner that most closely corresponded to domestic law and to the Convention as interpreted in the case law. In the circumstances of the instant case, there had been a violation of article 14 read in conjunction with article 8.

Cases referred to in judgment

(“A” means adopted; “AL” means allowed; “AP” means applied; “APP” means approved; “C” means considered; “D” means distinguished; “DA” means disapproved; “DT” means doubted; “E” means explained; “F” means followed; “O” means overruled)

United Kingdom

Appleby v UK [2003] ECHR 44306/98, ECT HR

Menson v UK [2003] ECHR 47916/99, ECT HR

Young v UK [1981] 4 EHRR 38, [1981] ECHR 7601/76, ECT HR

Others

Camp and Bourimi v Netherlands [2000] 3 FCR 307, ECT HR – “AP”

De Diego Nafria v Spain application number 46833/99 ECT HR

Fretté v France [2003] 2 FCR 39, ECT HR

Iglesias Gil and AUI v Spain application number 56673/00 ECT HR

Ignaccolo-Zenide v Romania [2000] ECHR 31679/96, ECT HR

Inze v Austria [1987] 10 EHRR 394, [1987] ECHR 8695/79, ECT HR

Johnston v Ireland [1986] 9 EHRR 203, ECT HR

Larkos v Cyprus [1998] EHRLR 653, E Com HR

Marckx v Belgium [1979] 2 EHRR 330, [1979] ECHR 6833/74, ECT HR – “AP”

Mazurek v France (application number 34406/97) ECT HR

Plattform "Arzte fur das Leben" v Austria [1988] ECHR 10126/82, ECT HR

Slivenko v Latvia [2004] 2 FCR 28, ECT HR

Van Raalte v Netherlands [1997] 24 EHRR 503, [1997] ECHR 20060/92, ECT HR

Vermeire v Belgium [1991] 15 EHRR 488, [1991] ECHR 12849/87, ECT HR

Winterwerp v Netherlands [1979] 2 EHRR 387, [1979] ECHR 6301/73, ECT HR

X and Y v Netherlands [1985] 8 EHRR 235, ECT HR

Application

BRATZA, STRAZNICKA, CASADEVALL, MARUSTE, GARLICKI, BORREGO BORREGO, PAVLOVSKI AND MO'BOYLE J: The applicants, two Andorran nationals, Mr Antoni Pla Puncernau and Mrs Roser Puncernau Pedro alleged

violations of article 8 taken alone and in conjunction with article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 by the High Court of Justice and the Constitutional Court in Andorra, whereby, in determining inheritance rights, they had discriminated against the first applicant on grounds of filiation. The facts are set out in the judgment.

(1) PROCEDURE

The case originated in an application (number 69498/01) against the Principality of Andorra lodged with the court under article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 [1953]; Cmd 8969) (the Convention) by two Andorran nationals, Mr Antoni Pla Puncernau and Mrs Roser Puncernau Pedro (the applicants), on 16 May 2001.

The applicants were represented by Mr Manuel Pujadas, of the Andorran Bar. The Andorran government (the government) were represented by their agent, Mrs Rosa Castellón Sánchez, head of the government's legal office.

The applicants alleged that, in determining inheritance rights, the High Court of Justice and the Constitutional Court had discriminated against the first applicant on grounds of filiation. In their submission, that had amounted to a violation of article 8 taken alone and in conjunction with article 14 of the Convention.

The application was allocated to the fourth section of the court (rule 52(1) of the Rules of Court). Within that section, the chamber that would consider the case (article 27(1) of the Convention) was constituted as provided in rule 261.

On 1 November 2001 the court changed the composition of its sections (rule 25(1)). This case was assigned to the newly composed fourth section (rule 52(1)).

By a decision of 27 May 2003 the chamber declared the application partly admissible.

The applicants and the government each filed observations on the merits (rule 59(1)).

A hearing took place in public in the Human Rights Building, Strasbourg, on 7 October 2003 (rule 59(3)).

There appeared before the court: (a) for the government Mrs Rosa Castellón Sánchez, agent, Mr Marc Vila Amigó, lawyer, counsel; Ms Mireille Fernández Llorens, lawyer, Mr Jorge Medina Ortiz, lawyer, advisers; (b) for

the applicants Mr Manuel Pujadas, lawyer, Ms Catalina Llufríu, lawyer, counsel; Ms Vanessa Durich, lawyer, adviser.

The court heard addresses by Mr Pujadas for the applicants and by Mr Vila Amigó for the government and their replies to a question put by the President of the Chamber.

(2) THE FACTS

The circumstances of the case

The first applicant, Mr Antoni Pla Puncernau, who was born in 1966, is the adopted son of the second applicant, Mrs Roser Puncernau Pedro. The second applicant was the first applicant's supervisor, Mr Pla Puncernau being mentally handicapped. They both lived in Andorra. She died when the proceedings were still pending before the court.

(a) Background to the Case

In 1949 Mrs Carolina Pujol Oller, the widow of Francesc Pla Guash, died leaving three children: Francesc-Xavier, Carolina and Sara. She had made a will before a notary in 1939. Under the seventh clause of her will she settled her estate on her son, Francesc-Xavier, as tenant for life. Should he be unable to inherit, the estate was to pass to his sister, Carolina, and if she was also unable to inherit, it was to pass to Sara's son, Joseph Antoni Serra Pla.

The testatrix indicated that Francesc-Xavier, the beneficiary and life tenant under her will, was to transfer the estate to a son or grandson of a lawful and canonical marriage. To that effect she had inserted the following clause in her will: 'The future heir to the estate must leave it to a son or grandson of a lawful and canonical marriage' (*'El qui arribi a ésser hereu haurà forçosament de transmetre l'herència a un fill o net de legítim canònic matrimoni.'*)

Should those conditions not be met, the testatrix had stipulated that the children and grandchildren of the remainder men under the settlement would be entitled to her estate.

The beneficiary under the will, Francesc-Xavier, contracted canonical marriage to the second applicant, Roser Puncernau Pedro. By deed drawn up on 11 November 1969 before a notary in La Coruna (Spain), they adopted a child, Antoni, in accordance with the procedure for full adoption. They subsequently adopted a second child.

In 1995 Francesc-Xavier Pla Pujol made a will in which he left 300 506 euros (EUR) to his son, Antoni (the first applicant), and EUR 180 303 to his daughter. He named his wife, Roser (the second applicant), sole heir to the remainder of his estate. In a codicil of 3 July 1995 Francesc-Xavier Pla Pujol

left the assets he had inherited under his mother's will to his wife for life and to his adopted son, Antoni, as remainder man. The assets in question consisted of real estate. On 12 November 1996 Francesc-Xavier Pla Pujol died. The codicil was opened on 27 November 1996.

Accordingly, the only potential heirs to the estate under the will are the applicants, Antoni Pla Puncernau and his mother, and two sisters, Carolina and Immaculada Serra Areny, who are the great-grandchildren of the testatrix.

(b) Civil action brought by the sisters Carolina and Immaculada Serra Areny to have the 1995 codicil set aside

On 17 July 1997 Carolina and Immaculada Serra Areny brought proceedings in the Tribunal des Batlles of Andorra to have the codicil of 3 July 1995 declared null and void and seeking an order requiring the applicants, as defendants in the proceedings, to return to the plaintiffs all the assets of the estate of Caroline Pujol Oller, their great-grandmother, and to pay them damages for unlawful possession of the assets.

In a judgment delivered on 14 October 1999, after hearing submissions from both sides, the Civil Division of the Tribunal des Batlles of Andorra dismissed the action for the following reasons:

"Both parties agree that it is the contents of the will that determine the testatrix's intention at the time of making it, so that the will has to be interpreted in accordance with that intention, which is to be inferred from the words used in the will (*Digest* 50, 16, 219). Since 1941 it has been apparent from the case law of the Andorran courts (judgment of the Judge of Appeals dated 3 February 1941) that "on both a partially intestate and a testate succession it is principally the testator's intention that must be taken into account, as can be inferred from many provisions of Roman and canon law."

In her will dated 12 October 1939 the testatrix stipulated that. "The future heir to the estate must leave it to a son or grandson of a lawful and canonical marriage ° (*El qui arribi a ésser hereu haurà forçosament de transmetre l'herència a un fill o net de legítim i canònic matrimoni*)."

In doing so, the will in question set up a family settlement *si sine liberis decesserit*. An analysis of this type of settlement shows that the purpose is to secure and preserve the estate by keeping it in the settler's family.

In interpreting the contents of the will in question account has to be taken, as has previously been stated, of the testatrix's intention in the light of the words used and the actual nature of the society in which she lived.

When the will was made, the Constitution had not been enacted and there was no ordinary statute or other relevant analogous provisions. Consequently, for the

purposes of interpreting the wording in a will reference has to be made to customary law, the *ius commune*, deriving from the influence of Roman law as amended by canon law, and to the relevant case-law of the Andorran courts. However, foreign legislation, case-law and legal theory cannot apply in the present case.

The *Corpus Iuris* provided for the institution of adoption and included in the word "child" children born out of wedlock and adopted children ° by providing for two forms of adoption: one undertaken under the authority of a *princep* and the other before a judge. The procedure followed in the first case was to ask the adoptive parent if he sought to take the adopted child as his legitimate child and to ask the adopted child if he consented. It was also stipulated that "a consanguineous relationship is not instituted by deed but by birth or solemn adoption (Diocletian and Maximianus, *Codi* 4, 19, 13). Furthermore, the father-child bond is not created by mere declarations or false assertions, even if both parties consent, but only by lawful marriage or solemn adoption (Diocletian and Maximianus, *Codi* 4, 19, 14)."

Consequently, according to the Roman concept of adoption, the adopted child leaves his family of origin and terminates all legal connection with it. On doing so he becomes the son of the adoptive parent's family and, as such, takes the family name and above all acquires inheritance rights. This institution has essentially been used for inheritance purposes. Subsequently, two forms of adoption became available: full adoption and simple adoption (*menys plena*), the sole purpose of the latter being to safeguard the adopted child's rights over the adoptive parent's estate. Full adoption is based on the idea that adoption must replace or imitate biological filiation.

If account is taken of the fact that adoption is a legal institution whose purpose is to enable childless couples to have children. At that time adoption therefore already satisfied a need, with the adopted child being regarded as a legitimate child. That approach was subsequently confirmed by the Constitution and by statute.

It cannot therefore be said that, by inserting that clause, the testatrix intended to prevent adopted or non-biological children from inheriting her estate. If that had been her intention she would have made express provision for it.

Accordingly, the codicil made by the late heir, Francesc-Xavier Pla Pujol, is compatible with the deceased Carolina Pujol Oller's will and cannot be declared null.

(c) Appeal to the High Court of Justice of Andorra

The Serra Areny sisters appealed to the High Court of Justice of Andorra. In a judgment delivered on 18 May 2000, after hearing submissions from both sides, the High Court set the lower court's judgment aside. It allowed the appeal, set aside the codicil of 3 July 1995, declared that the appellants were

the legitimate heirs to their great-grandmother's estate and ordered the applicants to return the property in question. The grounds for the court's judgment were as follows:

"Accordingly, the fundamental question to be resolved in the instant case is whether a child who has been adopted in accordance with the procedure for full adoption can be regarded as a child of a lawful and canonical marriage, as required by the testatrix.

This question has to be resolved in accordance with the legal rules on the relationship of adopted children to their adoptive parents that were in force in 1939 and 1949, that is, between the time when Mrs Caroline Pujol i Oller made her will and the date of her death. A will becomes a legal deed from the date on which it is made in accordance with the statutory formalities. Accordingly, in interpreting the testamentary dispositions, regard must be had in the instant case to the legal position of adopted children in the social and family conditions existing in 1939 when the will was made and possibly in 1949 when the testatrix died.

Legal commentators with first-hand experience of Andorran life stress that adoption is practically unheard of in Andorra (Brutails: "*Andorran customs*", page 122). That assertion is borne out by all the collections of Andorran case-law, in which there is no reference to adoption. This silence on the subject is perfectly understandable, moreover, given that the provisions of Roman law on adoption could not easily be transposed to Andorran families living in the first half of the twentieth century for the following reasons: since the nineteenth century it could be regarded as an institution that had become obsolete and, to an certain extent, unnecessary given that the main purpose—to appoint a successor or heir—had been achieved in the Principality of Andorra through the institution of *heretament* (agreement, specific to Catalan law, on the succession of a living person), introduced by customary law. In that social and family context it is difficult to sustain the proposition that, in setting up a family settlement in case her heir should die without leaving offspring of a lawful and canonical marriage, the testatrix was also referring to adopted children, given that, at the time, adoption was not an established institution in the Principality of Andorra.

The fact that in the instant case the adoptive parents were married to each other does not make their adopted child a legitimate child or a child born of the marriage. The distinction according to whether a child was born in or out of wedlock is relevant only to illegitimate children with regard to adopted children, the distinction according to whether a child was born in or out of wedlock does not apply. Accordingly, a child adopted by a couple is an adopted child and not a legitimate child or a child of the marriage.

Furthermore, the notarially recorded deed of adoption was drawn up in Spain in accordance with the Spanish procedure for full adoption ° The Law of 24 April

1958, amending the Civil Code, is applicable to the conditions and general effects of full adoption. Under that Law, the act of adopting a child gave him or her the status of the adoptive father/mother's child, but did not give the child family status with regard to the adoptive parents' family. Under article 174-VII of the Spanish Civil Code adoption created a filial tie between the adoptive parent, the adopted child and his or her legitimate descendants, but not with the adoptive parent's family. Moreover, the inheritance rights were also limited in the present case: the deed of adoption referred to the relevant 1960 Catalan legislation, that is, a compilation of 1960 Catalan civil law. Article 248 provided that on an intestate succession adopted children were entitled to inherit only from their adoptive father or mother and not from the rest of their adoptive parents' family. That rule reflected the idea that adoption created only a filial status and not a family status.

Accordingly, from a legal standpoint, the adopted children of persons on whom an estate was settled by their father or mother were unconnected with the family circle with regard to the beneficiary's ascendants. That approach can largely be explained by the minimal impact of adoption on the social and family consciousness in Andorra both at the time when the will was made and when the testatrix died. The testatrix's presumed intention has to be established in the light of the circumstances existing at the time of her death. The adopted children of her legitimate son or of the marriage were unconnected with the family circle both from a legal and a sociological point of view.

The purpose of a family settlement *si sine liberis decesserit* under Catalan law is to keep the family estate in the legitimate or married family and Catalan legal tradition has always favoured the exclusion of adopted children from such family settlements. Thus, in order for adopted children to inherit under this type of settlement there must be no doubt as to the testatrix's intention to depart from the usual nature of this institution. In the instant case the expression "offspring of a lawful and canonical marriage", which appears in the 1939 will, does not suffice to infer that the testatrix intended to depart from the usual meaning given to family settlements *si sine liberis decesserit* under the Catalan and Andorran law of succession.

It is apparent from the foregoing that, although the law in force when the child was actually adopted allowed adopted children to inherit from their adoptive parents on an intestate succession (code 8, 48, 10), those rights cannot extend to a testate succession, where the main factor is the testator's intention. Accordingly, any doubt as to the scope of the expression "offspring of a lawful and canonical marriage" falls away when the testatrix's intention is analysed in the light of the social, family and legal conditions in which she lived. In the present case nothing militates in favour of including the life tenant's adopted children, given the minimal impact of adoption on Andorran family and inheritance law; the adopted child's status as the adoptive parents' child (son) but not as a member of their parents'

family; the purpose traditionally ascribed to family settlements under Catalan law; and Catalan and Andorran legal tradition.”

(d) Application to the High Court of Justice of Andorra to have the proceedings set aside on grounds of nullity

The applicants lodged an application with the High Court of Justice to have the proceedings set aside. They submitted that they had breached the principle of equality before the law enshrined in article 6 of the Andorran Constitution and that they had breached article 10 (right to judicial protection and to a fair trial) of the Andorran Constitution. In a decision of 28 June 2000 the High Court of Justice dismissed their application as ill-founded.

(e) Appeal (*recurso de empara*) before the Constitutional Court

The applicants lodged an *empara* appeal with the Constitutional Court against the decisions of the High Court of Justice. They alleged a violation of article 13(3) (principle of children's equality before the law regardless of filiation) and article 10 (right to judicial protection and a fair trial) of the Andorran Constitution. In a decision of 13 October 2000 the Constitutional Court declared their appeal inadmissible for the following reasons:

“It seems clear that the judgment of the High Court of Justice is limited to clarifying and determining, that is, interpreting, a specific point concerning the testatrix's intention, as expressed in her will in the form of a family settlement in favour of a child or grandson of a lawful and canonical marriage.

The High Court of Justice does not at any point suggest that there is general discrimination against or inequality between children according to whether they are biological or adopted. Such an assertion would evidently amount to a flagrant breach of article 13(3) of the Constitution and would also be contrary to the prevailing legal opinion according to which legal systems must always be interpreted, which is that all children are equal, irrespective of their origin. However, as submitted in substance by State Counsel, “discrimination against adopted children as compared to biological children does not in the instant case derive from an act of the public authorities, that is, from the judgment of the Civil Division of the High Court of Justice, but from the intention of the testatrix or settler regarding who should inherit under her will” in accordance with the principle of freedom to make testamentary dispositions, which is a concrete manifestation of the general principle of civil liberty.

In its judgment the High Court of Justice confined itself to interpreting a testamentary disposition. It did so from the legal standpoint that it considered adequate and in accordance with its unfettered discretion, seeing that the interpretation of legal instruments is a question of fact which, as such, is reserved to the jurisdiction of the ordinary courts.”

The applicants lodged an appeal (*recurso de súplica*) with the Constitutional Court, which dismissed it on 17 November 2000.

(3) RELEVANT DOMESTIC LAW

Andorran Constitution of 14 March 1993. Article 6:

- “(1) Everyone is equal before the law. No one may be discriminated against on grounds of birth, race, sex, origin, religion, opinions or any other personal or social condition.
- (2) The public authorities shall create the conditions necessary to give full effect to the principles of equality and freedom.”

Article 13:

- “(1) The civil status of persons and forms of marriage shall be regulated by law. Canonical marriages are recognised as having civil effects °
- (2) Both spouses have the same rights and duties. All children are equal before the law, regardless of their filiation.”

Article 14: 'Everyone has the right to respect for their privacy, honour and image. Everyone is entitled to legal protection from unlawful interference with their private and family life.'

Special Law (qualificada) of 21 March 1996 on the adoption and protection of minors in distress. Section 24: 'Adopted children have the same rights and obligations within the adoptive family as legitimate children.'

(4) THE LAW

The government's preliminary objection

The government raised an objection on the ground that article 8 of the Convention was inapplicable to the facts in this case because there had been no 'family life' within the meaning of that provision between the applicants and Carolina Pujol Oller. In that connection the government referred to the lack of a genuine relationship between the grandmother, Carolina Pujol Oller, who had died in 1949, and the applicant, who was adopted in 1969. In the government's submission, the court had always adopted a pragmatic approach to the concept of 'family life' in order to protect *de facto* family life rather than *de jure* family life. In that sense the existence of a formal family tie was insufficient to attract the protection of article 8.

For their part, the applicants disputed the government's submission, arguing that, if upheld, it would, for example, exclude posthumous children from the scope of article 8. Moreover, the government's argument also

concerned Carolina and Immaculada Serra, who had brought the proceedings in the Andorran courts to have the codicil set aside and had not known their great-grandmother either.

The court reiterates that in *Marckx v Belgium* [1979] 2 EHRR 330 “AP” it accepted that the right of succession between children and parents, and between grandchildren and grandparents, was so closely related to family life that it came within the sphere of article 8. It has thus considered that matters of intestate succession—and voluntary dispositions—between near relatives proved to be intimately connected with family life. Family life does not include only social, moral or cultural relations, for example in the sphere of children's education; it also comprises interests of a material kind, as is shown by, amongst other things, the obligations in respect of maintenance and the position occupied in the domestic legal systems of the majority of the contracting states by the institution of the reserved portion of an estate (*réserve héréditaire*) (see *Marckx v Belgium* [1979] 2 EHRR 330 at paragraphs 51–52). The fact that Carolina Pujol Oller had died before the first applicant was adopted is no reason for the court to adopt a different approach in the present case (see, *mutatis mutandis*, *Camp and Bourimi v Netherlands* [2000] 3 FCR 307 at 314 (paragraph 35)). Article 8 is therefore applicable.

Alleged violation of article 14 read in conjunction with article 8 of the Convention.

The applicants complained that, in determining inheritance rights, the High Court of Justice and the Constitutional Court had breached the applicants' right to respect for their private and family life by unjustifiably discriminating against the first applicant on grounds of his filiation. They submitted that this had resulted in a violation of article 14 taken together with article 8 of the Convention.

Article 8 of the Convention provides:

“Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Article 14 provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language,

religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

(5) THE PARTIES' SUBMISSIONS

(a) The applicants

The applicants stressed at the outset that the court was faced with a new problem that it had never yet had to deal with. The previous cases it had examined (see *Marckx v Belgium*, *Inze v Austria* [1987] 10 EHRR 394) had concerned the statutory provisions governing instances of intestate succession that had given rise to an unlawful interference by the state with the applicants' family life and/or discrimination in family relations on grounds of birth.

The present case related to the private sphere since it concerned the freedom to arrange one's affairs in the form of a will made by Carolina Pujol Oller in 1939. The testatrix had died in 1949. The applicant was adopted in 1969 and it was not until 1996, after the death of Carolina's son and life tenant under her will, that the codicil he had drawn up in 1995 was opened. The applicants were in no doubt that the case fell to be examined under the provisions of private law, which had to be read in the light of Andorran law as in force in 1996 and the Convention. Those rules had evidently not been applied by the High Court of Justice.

The applicants pointed out that customary law (*ius commune*) was a supplementary source of civil law under the Andorran law in force in Andorra. There is *commune* in force in Andorra incorporated Andorran customary law based on Roman law as revised in the light of canon law. That was the applicable legal framework in 1939, when the will was made. Adoption had already been a feature of canon law when it was first drafted over a thousand years ago. The Catholic Church attributed to adopted children the characteristics laid down in canon 1094 of the Benedict XV Code, which was the relevant legislation in force when the will had been drafted in 1939. Those characteristics had been confirmed in 1983 by canon 110 of the modern Code of Canon Law which enshrined the principle that adopted children and legitimate children were equal. There was abundant case-law authority to support the submission that canon law was a supplementary source of law in the Principality of Andorra. Moreover, under Roman law adopted children had the same inheritance and family rights as legitimate and illegitimate children. Adoption had therefore been envisaged both in canon law and in Roman law. It was therefore undeniably a known legal institution that had been used by Andorrans in 1939.

With regard to the rules on interpreting wills, the applicants reiterated that, in accordance with the relevant Roman tradition, where a testamentary

disposition was clear and unambiguous there was no need to depart from it on the pretext of ascertaining its meaning.

Accordingly, if the testatrix had really intended to exclude adopted children from the family settlement she would have inserted a specific clause to that effect, as was habitually done by Andorran and Catalan notaries. In that connection the applicants referred to the many forms, notarial deeds and court decisions by which adopted sons were in practice always prevented from inheriting an estate by an express exclusion clause which required the child to be legitimate and biological. This was phrased in the following ways: 'son of a lawful, canonical and carnal marriage' or 'legitimate and biological son of a canonical marriage' or 'son procreated by lawful and carnal marriage'. In the present case, however, Carolina Pujol Oller had made no mention in her will of any tacit or express exclusion of adopted sons. The sole purpose of the clause had been to exclude illegitimate sons.

The High Court of Justice of Andorra had therefore failed to apply the appropriate law in the present case. In the applicants' submission, the court should have interpreted the will in accordance with the legislation in force in 1996, particularly the Andorran Constitution of 1993 and the Adoption Law of March 1996. That total failure to apply the appropriate law had resulted in an interference with their rights by the Andorran authorities, which were the ultimate guarantors of their right to enjoy their family life without any unjustified discrimination. In their view, the testatrix had clearly not made any distinction in her will regarding adopted children. Accordingly, it was neither for individuals nor the courts to make such a distinction, which was moreover contrary to the Andorran Constitution and the European Convention. The judgment of the High Court of Justice therefore amounted to an unlawful interference with their private and family life, which was clearly discriminatory as regards the first applicant. That interference and discrimination were expressly prohibited by the Andorran Constitution of 1993 and the Special Law on adoption and other forms of protection of abandoned minors enacted in March 1996.

In conclusion, the applicants submitted that there had been a violation of article 8 and 14 of the Convention.

(b) The government

The government stressed at the outset that Andorran law did not in any way discriminate between adopted children and legitimate children. In *Marckx's* case the court had found a violation of the Convention, but that had been based on a statutory discrimination. It was the exact opposite situation here, since Andorran law recognised that grandchildren, be they legitimate, illegitimate or adopted, had the same statutory inheritance rights with regard

to their parents (reserved portion of the estate on a testate succession and hereditary rights on an intestate succession) and with regard to their grandparents. In the government's submission, the present case differed substantially from *Marckx's* case because the applicant had been left more than EUR 300 000 by his father and had had the same inheritance rights as his sister or any other legitimate brother or sister if there had been one.

The property dispute in the present case arose as a result of the free will of a testatrix who, under domestic law, had been entirely free to dispose of her property as she wished, apart from the reserved portion. Subject to that restriction, the freedom to dispose of the remaining assets was protected under Andorran law. Once the portion reserved to the heirs was protected, testators were free to dispose of the rest of the property as they wished. That was precisely what had happened here. The government submitted that there had been no interference with the applicants' family life. Moreover, even supposing that the decisions of the Andorran courts could be deemed to have interfered with the rights to which the applicants referred, the interference had been justified. Firstly, the decision of the High Court could be deemed to have pursued the legitimate aim of protecting the right of the true heirs under the settlement and, accordingly, was aimed at protecting the rights and freedoms of others. Secondly, the decision complained of fell within the states' margin of appreciation in areas such as the one at issue here. In sum, a fair balance had been struck between the competing rights in question.

In the government's submission, the High Court of Justice's interpretation was in keeping with the testatrix's intention in 1939 and the law in force in Andorra at the time of her death in 1949. According to the legal tradition applicable at the time, adopted sons did not have the same rights as legitimate sons under family settlements because the purpose of that institution was to keep the family estate in the family. The postglossators had already observed that extending family settlements to adopted sons meant that the fulfilment of the condition was in the hands of the life tenant with the clear risk of fraud or abuse of right that that entailed.

The government reiterated that the interpretation of domestic law was a matter solely for the domestic courts, which were the best placed to interpret and apply domestic law. The court's scrutiny was limited to ensuring that that application and interpretation were compatible with the requirements of the Convention. In the present case the High Court of Justice had found, after examining the domestic law and the parties' allegations in detail in the course of the due exercise of its functions in interpreting the intention of the testatrix, that she had not included a provision expressly excluding adopted children because, to her mind, they had clearly been excluded by the term 'son of a legitimate and canonical marriage'. In sum, the High Court of

Justice's interpretation had not breached the Convention because the judgment contained no humiliating expression or declaration or one that could be regarded as infringing the human dignity of adopted children. The judgment was limited to finding that the testatrix had not intended adopted children to inherit her estate. Moreover, the will did not contain any clause that was illegal or contrary to public policy. The government observed that any entitlement under a will was, by definition, discriminatory in that it generated differences between heirs.

In conclusion, the government submitted that there had been no violation of the provisions in question.

(c) The court's assessment

Since the issue of alleged discriminatory treatment of the first applicant is at the heart of the applicants' complaint, the court considers it appropriate to examine the complaint first under article 14 read in conjunction with article 8 of the Convention.

The court has had occasion, in previous cases, to examine allegations of differences of treatment for succession purposes both under article 14 taken together with article 8 (see *Marckx v Belgium* [1979] 2 EHRR 330 at paragraph 54, and.

Vermeire v Belgium (1991) 15 EHRR 488 at paragraph 28) and under article 14 taken together with article 1 of Protocol number 1 (see *Inze v Austria* (1987) 10 EHRR 394 at paragraph 40, and *Mazurek v France* (application number 34406/97) (1 February 2000, UR) at paragraph 43). The court reaffirms that the essential object of article 8 is to protect the individual against arbitrary interference by the public authorities (see, for example, *Johnston v Ireland* (1986) 9 EHRR 203 at paragraph 55, and *Camp and Bourimi v Netherlands* [2000] 3 FCR 307 at 313 (paragraph 28)). That being said, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for private or family life (see *Marckx v Belgium* [1979] 2 EHRR 330 at paragraph 31).

The factor common to those cases was that the difference of treatment of which complaint was made resulted directly from the domestic legislation, which distinguished between legitimate and illegitimate children (see *Marckx's*, *Vermeire's* and *Inze's* cases) or between children born of an adulterous relationship and other children, whether or not born in wedlock (see *Mazurek's* case). The question raised in each of the cases was whether such difference of treatment within the legal system of the respondent states violated the rights of the applicants under article 14 read in conjunction with article 8 of the Convention or article 1 of Protocol number 1.

The essential difference between the present case and the above-cited ones is that in the instant case the court is not required to determine whether there is an incompatibility between the Convention and the Andorran statutory provisions on adopted children's inheritance rights. The court notes in that connection, moreover, that the parties agreed that both the Andorran Constitution of 1993 and the Special Law on Adoption of 21 March 1996 were compatible with the principle under article 14 of the Convention prohibiting discrimination on grounds of birth. In the present case the question at issue concerns the High Court of Justice of Andorra's interpretation, upheld by the Constitutional Court, of a testamentary disposition drafted in 1939 and executed in 1995. The court has to determine whether that interpretation breached article 14 taken together with article 8 of the Convention.

Clearly the Andorran authorities cannot be held liable for any interference with the applicants' private and family life any more than the Andorran state can be held liable for a breach of any positive obligations to ensure effective respect for family life. The applicants confined themselves to challenging a judicial decision that had declared a private deed disposing of an estate to be contrary to the testatrix's wishes. The only outstanding question is that of the alleged incompatibility with the Convention of the Andorran courts' interpretation of domestic law.

On many occasions and in very different spheres the court has declared that it is in the first place for the national authorities, and in particular the courts of first instance and appeal, to construe and apply the domestic law (see, for example, *Winterwerp v Netherlands* [1979] 2 EHRR 387 at paragraph 46; *Iglesias Gil and AUI v Spain* application number 56673/00 (29 April 2003, UR) at paragraph 61; and *Slivenko v Latvia* [2004] 2 FCR 28 at 56 (paragraph 105)). That principle, which by definition applies to domestic legislation, is all the more applicable when interpreting an eminently private instrument such as a clause in a person's will. In a situation such as the one here the domestic courts are evidently better placed than an international court to evaluate, in the light of local legal traditions, the particular context of the legal dispute submitted to them and the various competing rights and interests (see, for example, *De Diego Nafria v Spain* application number 46833/99 (14 March 2002 (UR) at paragraph 39)). When ruling on disputes of this type the national authorities and, in particular, the courts of first instance and appeal have a wide margin of appreciation.

Accordingly, an issue of interference with private and family life could only arise under the Convention if the national courts' assessment of the facts or domestic law were manifestly unreasonable or arbitrary or blatantly inconsistent with the fundamental principles of the Convention.

The present case dates back to 1939 when Carolina Pujol Oller, Francesc Pla Guash's widow, made a will before a notary, the seventh clause of which settled her estate on her son, Francesc-Xavier (the first applicant's father) as life tenant with the remainder to a son or grandson of a lawful and canonical marriage. Should those conditions not be met, the testatrix stipulated that her estate had to pass to the children and grandchildren of the remainder men under the settlement. In 1949 Carolina Pujol Oller died.

The beneficiary under the will, Francesc-Xavier Pla Pujol, contracted canonical marriage to the second applicant, Roser Puncernau Pedro. By deed sworn before a notary in La Coruna (Spain) on 11 November 1969 the couple adopted a child, Antoni (the first applicant), in accordance with the procedure for full adoption in force under Catalan law. They subsequently adopted a second child.

By a codicil dated 3 July 1995 Francesc-Xavier Pla Pujol left the assets he had inherited under his mother's will to his wife (the second applicant) for life, with the remainder to his adopted son, Antoni. Francesc-Xavier Pla Pujol died on 12 November 1996. The codicil was opened on 27 November 1996. The assets in question consisted of real estate.

Submitting that, as an adopted child, the first applicant could not inherit under the will made by the testatrix in 1939, two great-grandchildren of hers brought civil proceedings in the Tribunal des Batlles, which dismissed their action. The High Court of Justice set the judgment aside on appeal and granted the appellants' claim. An appeal against that judgment was dismissed by the Constitutional Court.

With regard to the interpretation of the testamentary disposition, which is at the heart of the dispute, the Tribunal des Batlles which dealt with the case at first instance analysed the clause grammatically in the light of the historical background and applying Roman law as amended by canon law, which is a source of the general law applicable in Andorra. It concluded that the action should be dismissed. The court added that no foreign legislation, case-law or legal theory was applicable in the Principality. In its view, neither the wording of the clause nor the intention of the testatrix could prevent adopted children from inheriting under the will.

On appeal, the High Court of Justice construed the relevant facts and law differently. In the first place it found that adoption had been practically unheard of in Andorra during the first half of the twentieth century. It concluded from this that it was difficult to reconcile the testatrix's act of creating a family settlement in case the life tenant should die without leaving offspring of a lawful and canonical marriage with an intention to extend the arrangement to adopted children. Similarly, the court observed that the deed

of adoption had been drawn up in Spain in accordance with the Spanish procedure for full adoption. Under the Spanish law applicable at the time, particularly Catalan law (to which the deed of adoption referred), on an intestate succession adopted children could inherit only from their adoptive father or mother and not from the rest of the adoptive parents' family. When examining the testatrix's intention, the court found that both at the time when the will was made in 1939 and on the testatrix's death in 1949 the adopted children of her legitimate son or son of the marriage were outside the family circle from a legal and sociological point of view. The court found that, in order for adopted children to be able to inherit under a Catalan family settlement, there would have to be no doubt as to the testatrix's intention to depart from the usual meaning ascribed to that arrangement. The terms used in the will did not support that conclusion.

The court notes that the Andorran courts gave two different interpretations: the first, given by the Tribunal des Batlles, was favourable to the applicants and the second, given by the High Court of Justice, went against them. Both are based on factual and legal elements that were duly evaluated in the light of the particular circumstances of the case.

The court reiterates that article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded by those provisions. Although the application of article 14 does not presuppose a breach of those provisions—and to this extent it is autonomous—there can be no room for its application unless the facts in issue fall within the ambit of one or more of the latter (see, among many other authorities, *Van Raalte v Netherlands* [1997] 24 EHRR 503 at paragraph 33, and *Camp and Bourimi v Netherlands* [2000] 3 FCR 307 at 314 (paragraph 34)).

The court has found above that the facts of the case fell within article 8 of the Convention. Accordingly, article 14 can apply in conjunction with article 8.

The court does not consider it appropriate or even necessary to analyse the legal theory behind the principles on which the domestic courts, and in particular the High Court of Justice of Andorra, based their decision to apply one legal system rather than another, be it Roman law, canon law, Catalan law or Spanish law. That is a sphere which, by definition, falls within the jurisdiction of the domestic courts.

The court considers that, contrary to the government's affirmations, no question relating to the testatrix's free will is in issue in the present case. Only the interpretation of the testamentary disposition falls to be considered. The

court's task is therefore confined to determining whether, in the circumstances of the case, the first applicant was a victim of discrimination contrary to article 14 of the Convention.

In the present case the court observes that the legitimate and canonical nature of the marriage contracted by the first applicant's father is indisputable. The sole remaining question is therefore whether the notion of 'son' in Carolina Pujol's will extended only, as the High Court of Justice maintained, to biological sons. The court cannot agree with that conclusion of the Andorran appellate court. There is nothing in the will to suggest that the testatrix intended to exclude adopted grandsons. The court understands that she could have done so, but as she did not the only possible and logical conclusion is that this was not her intention.

The High Court of Justice's interpretation of the testamentary disposition, which consisted in inferring a negative intention on the part of the testatrix and concluding that since she did not expressly state that she was not excluding adopted sons this meant that she did intend to exclude them, appears over contrived and contrary to the general legal principle that where a statement is unambiguous there is no need to examine the intention of the person who made it (*quum in verbis nulla ambiguitas est, non debet admitti voluntatis questio*).

Admittedly, the court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination established by article 14 and more broadly with the principles underlying the Convention (see *Larkos v Cyprus* [1998] EHRLR 653 at paragraph 30-31).

In the present case the High Court of Justice's interpretation of the testamentary disposition in question had the effect of depriving the first applicant of his right to inherit under his grandmother's estate and benefiting his cousin's daughters in this regard. Furthermore, the setting aside of the codicil of 3 July 1995 also resulted in the second applicant losing her right to the life tenancy of the estate assets left her by her late husband.

Since the testamentary disposition, as worded by Carolina Pujol, made no distinction between biological and adopted children it was not necessary to interpret it in that way. Such an interpretation therefore amounts to the judicial deprivation of an adopted child's inheritance rights.

The court reiterates that a distinction is discriminatory for the purposes of article 14 if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised' (see, *inter alia*, *Fretté v France* [2003] 2 FCR 39 at paragraph 34). In the present case the court does not discern any legitimate aim pursued by the decision in question or any objective and reasonable justification on which the distinction made by the domestic court might be based. In the court's view, where a child is adopted (under the full adoption procedure moreover) the child is in the same legal position as a biological child of his or her parents in all respects: relations and consequences connected with his family life and the resulting property rights. The court has stated on many occasions that very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of wedlock can be regarded as compatible with the Convention.

Furthermore, there is nothing to suggest that reasons of public policy required the degree of protection afforded by the Andorran appellate court to the appellants to prevail over that afforded to the applicant.

The court reiterates that the Convention, which is a dynamic text and entails positive obligations for states, is a living instrument, to be interpreted in the light of present-day conditions and that great importance is attached today in the member states of the Council of Europe to the question of equality between children born in and children born out of wedlock as regards their civil rights (see *Mazurek v France* (application number 34406/97) at paragraph 30). Thus, even supposing that the testamentary disposition in question did require an interpretation by the domestic courts, that interpretation could not be made exclusively in the light of the social conditions existing when the will was made or at the time of the testatrix's death, namely in 1939 and 1949, particularly where a period of 57 years had elapsed between the date when the will was made and the date on which the estate passed to the heirs. Where such a long period has elapsed, during which profound social, economic and legal changes have occurred, the courts cannot ignore these new realities. The same is true with regard to wills: any interpretation, if interpretation there must be, should endeavour to ascertain the testator's intention and render the will effective, while bearing in mind that 'the testator cannot be presumed to have meant what he did not say' and without overlooking the importance of interpreting the testamentary disposition in the manner that most closely corresponds to domestic law and to the Convention as interpreted in the court's case law.

Having regard to the foregoing, the court considers that there has been a violation of article 14 read in conjunction with article 8.

In the light of the conclusion set out in the previous paragraph, the court is of the opinion that there is no need to examine the application separately under article 8 read alone.

(6) APPLICATION OF ARTICLE 41 OF THE CONVENTION

(a) Article 41 of The Convention Provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

(b) Pecuniary and Non-Pecuniary Damage

The applicants submitted, firstly, that just satisfaction should take the form of setting aside the High Court of Justice's judgment, upholding the judgment of the Tribunal des Batlles and reinstating the first applicant as life tenant of the estate of his grandmother, Carolina Pujol Oller. Should that not be possible, they submitted that their pecuniary loss corresponded to the value of the assets in Carolina Pujol Oller's estate, which consisted of the following real property in the Principality of Andorra: *the Hort de la Canaleta*, the *Hort d'ensucaranes*, the *Rec Vell de l'Obach*, the *Hotèl Pla* and the *Boïgues del Pla*. According to an expert valuation dated 10 May 2001, the property was estimated to be worth 127 625 000 pesetas (767 042 euros (EUR)). In their last pleadings submitted at the hearing before the court, the applicants submitted that, according to a recent expert valuation, the pecuniary damage amounted to EUR 1 195 913.

In respect of non-pecuniary damage, having regard to the health problems they had suffered—particularly the second applicant who was now 80 years old—and in view of the various proceedings brought before the Andorran courts, the applicants assessed the non-pecuniary damage sustained by the first applicant at EUR 120 000 and that sustained by the second applicant, who was his mother and supervisor, at EUR 30 000.

The government, for their part, maintained that these claims were manifestly excessive. They submitted that since, under Andorran law, the first applicant's father could have kept for himself half the assets inherited from his mother the government were liable for only half the value of the estate in question, this being the assets that had to be transferred to the first applicant. They did not accept the applicants' valuation of the assets. According to their expert's valuation, the Pla hotel was worth EUR 661 885. The aggregate value of the other property (land) was EUR 89 281. In all, the Pla family's fortune had to be estimated at a maximum of EUR 751 166 deductible by one half: one quarter being the reserved portion of the estate and a further quarter being the amount of which the life tenant (the first applicant's father)

could freely dispose. With regard to non-pecuniary damage, the government submitted that the finding of a violation constituted in itself adequate just satisfaction.

(c) Costs and Expenses

In respect of the costs and expenses relating to their legal representation the applicants claimed the reimbursement of EUR 76 460. They provided the following supporting documents:

EUR 30 094 for fees incurred in the proceedings at first instance (supporting invoice dated 26 October 1999);

EUR 14 320 for fees incurred in the proceedings before the High Court of Justice (supporting invoice dated 10 May 2000);

EUR 7 611 for fees incurred before the Constitutional Court (supporting invoice dated 30 November 2000);

EUR 967 for fees paid to the solicitor in the domestic proceedings (supporting invoices dated 2 November 1999 and 10 November 2000);

EUR 9 916 for fees incurred in opposing enforcement of the High Court of Justice's judgment of 18 May 2000 (supporting invoice);

EUR 1 171 for fees incurred in having Carolina Pujol Oller's estate valued (supporting invoice dated 10 May 2001);

EUR 12 378 for fees incurred in the proceedings before the court (supporting invoices itemising the costs of defending the applicants before the court).

The government submitted that the amounts claimed by the applicants under this head were exorbitant. In their submission, the costs incurred in the domestic courts should not be taken into consideration.

Having regard to the foregoing considerations, the government requested the court not to rule at this stage on the question of the application of article 41, which, in their opinion, was not ready for decision.

In the circumstances of the case the court considers that the question of the application of article 41 of the Convention is not ready for decision. Consequently, it must be reserved and the subsequent procedure fixed taking due account of the possibility of an agreement between the respondent state and the applicants (rule 75(1)). The court allows the parties six months in which to reach such agreement.

(7) FOR THESE REASONS, THE COURT:

Holds unanimously that the government's objection must be dismissed;

Holds by five votes to two that there has been a violation of article 14 read in conjunction with article 8;

Holds unanimously that it is not necessary to examine the application separately under article 8 read alone;

Holds unanimously that the question of the application of article 41 is not ready for decision and accordingly,

- (a) *reserves* the whole of the said question;
- (b) *invites* the government and the applicants to inform it within six months of any agreement they might reach;
- (c) *reserves* the subsequent procedure and *delegates* to the President of the Chamber power to fix the same if need be.

In accordance with article 45(2) of the Convention and rule 74(2) of the Rules of Court, the partly dissenting opinion of Sir Nicolas Bratza and the dissenting opinion of Mr L Garlicki are annexed to this judgment.

(8) PARTLY DISSENTING OPINION OF JUDGE BRATZA

While I share the view of the majority of the Chamber that the applicants' claim falls within the ambit of article 8 of the Convention and that article 14 is accordingly applicable, I am unable to agree with the majority's conclusion that there has been a violation of the two articles read in conjunction.

As is noted in the judgment, the present case is of an entirely different character from those previously examined by the court involving allegations of discriminatory treatment in the field of succession and inheritance. In each of the earlier cases, it was the domestic legislation itself which gave rise to the difference of treatment of which complaint was made under the Convention, distinguishing as it did between the rights of succession of legitimate and illegitimate children (see *Marckx v Belgium* [1979] 2 EHRR 330 at paragraph 54; *Vermeire v Belgium* [1991] 15 EHRR 488 at paragraph 28 and *Inze v Austria* [1987] 10 EHRR 394 at paragraph 40) or between children born of an adulterous relationship and other children, whether legitimate or not (see *Mazurek v France* (application number 34406/97) (1 February 2000, UR) at paragraph 43). In the present case no such complaint is made or could be made against Andorra, discrimination on grounds of birth being expressly prohibited by both the Andorran Constitution and the Special Law on Adoption.

It is also important to observe that, although the applicants complain of the decisions of the High Court of Justice and the Constitutional Court of Andorra, it is not asserted that the decisions directly interfered with the applicants' article 8 rights or subjected the first applicant to discriminatory

treatment in the enjoyment of his family life by creating distinctions between the biological and adopted members of his family. As appears from the terms of its judgment, in upholding the appeals of the Serra Areny sisters and finding that, as an adopted child of the life tenant under the will of Caroline Pujol Oller, the first applicant was excluded from inheriting under the will, the High Court of Justice of Andorra sought to give effect to the intention of the testatrix herself in the exercise of her right to dispose of her property on her death. The circumstances of the present case are in this respect quite different from those which have frequently been examined by the court, in particular under article 10 of the Convention, in which it was the decisions of the domestic courts themselves which had restricted, penalised or otherwise interfered with the exercise of the Convention right in question and which required to be justified.

The fact that, under the Convention, the legislative or judicial organs of the state are precluded from discriminating between individuals (by, for instance, creating distinctions based on biological or adoptive links between children and parents in the enjoyment of inheritance rights) does not mean that private individuals are similarly precluded from discriminating by drawing such distinctions when disposing of their property. It must in principle be open to a testator, in the exercise of his or her right of property, to choose to whom to leave the property and, by the terms of the will, to differentiate between potential heirs, by (*inter alia*) distinguishing between biological and adoptive children and grandchildren. As pointed out in the opinion of Judge Garlicki the testator's right of choice finds protection under the Convention, namely in article 8 and in article 1 of Protocol number 1. The state must in principle give effect, through its judicial organs, to such private testamentary disposition and cannot be held to be in breach of its Convention obligations (including its obligations under article 14) by doing so, save in exceptional circumstances where the disposition may be said to be repugnant to the fundamental ideals of the convention or to aim at the destruction of the rights and freedoms set forth therein. This remains true even if there may appear to be no objective and reasonable justification for the distinction made by a testator.

In my view, the distinction which was held by the domestic courts to have been intended by the testatrix in the present case between biological and adopted grandchildren cannot be said to be repugnant to the fundamental ideals of the Convention or otherwise destructive of Convention rights and freedoms. Nor do I understand the majority of the Chamber of the Court to suggest to the contrary. It is true that in paragraph 46 of the judgment it is said that an issue of interference with private and family life under the Convention could arise if the national court's assessment of the facts or domestic law were 'blatantly inconsistent with the fundamental principles of the Convention' and

in paragraph 59 such inconsistency is found to have existed in the national courts' assessment in the present case. However, I do not read this finding as suggesting that the upholding by a national court of a will which distinguishes between biological and adopted children is of itself to be seen as incompatible with Convention principles. The majority's finding is, as I understand it, based rather on the ground that the High Court's interpretation of the will in the present case and its assessment of the intention of the testatrix were clearly wrong and that accordingly it was that court's decision that, as an adopted grandchild, the first applicant was excluded from inheriting the estate which itself gave rise to a violation of article 14.

The central question thus raised is whether the manner in which the domestic courts interpreted the will of the testatrix or applied the principles of domestic law was such as to permit such a finding. The majority of the chamber have recalled in paragraph 46 of the judgment the principles established by the court's jurisprudence concerning the interpretation and application of domestic law: it is in the first place for the national authorities, and in particular the national courts, to construe and apply domestic law. I would agree with the majority that this principle applies a fortiori when the national courts are concerned with resolving disputes between private individuals or interpreting a private testamentary disposition, such courts being better placed than an international court to evaluate, in the light of local legal traditions, the particular context of the legal dispute and the competing rights and interests involved.

This being so, an issue would in my view only arise under the Convention if the court were satisfied that the interpretation of the will or of the relevant principles of domestic law by the national courts was, to use the terms of the judgment, 'manifestly unreasonable or arbitrary'.

Thus far, I am in agreement with the majority's approach. Where I strongly disagree is as to the majority's application of these principles when examining the judgments of the national courts. So far from assessing the judgments according to these strict standards, the majority have to my mind substituted their own view of the proper interpretation of the will for that of the High Court of Justice of Andorra, preferring the construction placed on the will by the Tribunal des Batlles. While I can readily accept that one might prefer both the reasoning and the result reached by the first instance court, I cannot accept that the decision of the appeal court may be characterised as either arbitrary or manifestly unreasonable.

I note at the outset that there was no real divergence between the Tribunal des Batlles and the High Court of Justice as to the appropriate date for the purposes of interpreting the testamentary disposition. Both agreed that the testatrix's intention had to be construed essentially in the light of the legal

status of adopted children in the social and family conditions that obtained in 1939 when the will was drafted. The difference of opinion centered rather on the meaning to be ascribed to the clause 'son of a legitimate and canonical marriage'.

As noted in the judgment, the Tribunal des Batlles analysed the clause grammatically in the light of the historical background and applying Roman law as amended by canon law, being a source of the general law applicable in Andorra. In its view, it could not be said that, by inserting the clause, the testatrix had intended to prevent adopted or non-biological children from inheriting her estate; had this been her intention, she would have made express provision for it.

On appeal, the High Court of Justice construed both the relevant facts and law differently. As appears from the judgment, it found that adoption had been practically unheard of in Andorra during the first half of the twentieth century. It concluded from this that it was difficult to reconcile the testatrix's act of creating a family settlement in case the life tenant should die without leaving offspring of a lawful and canonical marriage with an intention to extend the arrangement to adopted children, since adoption was not an established institution in the Principality at the time. Similarly, the court observed that the deed of adoption had been drawn up in Spain in accordance with the Spanish procedure for full adoption. Under the Spanish law applicable at the time, particularly Catalan law (to which the deed of adoption referred), on an intestate succession adopted children could inherit only from their adoptive father or mother and not from the rest of the adoptive parents' family. When examining the testatrix's intention, the court found that both at the time when the will was made in 1939 and on the testatrix's death in 1949 the adopted children of her legitimate son or son of the marriage were outside the family circle from a legal and sociological point of view. The purpose of a family settlement *si sine liberis decesserit* under Catalan law was, in the view of the court, to keep the family estate in the legitimate or married family and Catalan legal tradition had always favoured the exclusion of adopted children from such family settlements. The court thus found that, in order for adopted children to be able to inherit under a Catalan family settlement, there would have to be no doubt as to the testatrix's intention to depart from the usual meaning ascribed to that arrangement. The terms used in the will did not support that conclusion.

The majority of the court, while finding it neither appropriate nor necessary to analyse the legal theory behind the decision of the High Court to apply one legal system rather than another, be it Roman, canon, Catalan or Spanish law (paragraph 56), reject that court's conclusion that the clause in the will referred only to biological 'sons'. It is said that 'there is nothing in the will to suggest that the testatrix intended to exclude adopted grandsons' and that, as it was open to her to have done so, 'the only possible and logical conclusion is that this was not her

intention' (paragraph 58). The judgment goes on to state that the High Court's interpretation of the will, by which it inferred a negative intention on the part of the testatrix, 'appears over contrived and contrary to the general legal principle that where a statement is unambiguous there is no need to examine the intention of the person who made it'.

In my view, this analysis does not do justice to the reasoning of the High Court, which examined the meaning to be attributed to the disputed clause in the will in the light of the surrounding circumstances, both factual and legal, at the time of the disposition. Whether or not that reasoning is convincing and whether or not the view of the Tribunal des Batles is to be preferred, I am quite unable to conclude, as the majority do, that the High Courts' decision was unreasonable, arbitrary or 'blatantly inconsistent with the prohibition of discrimination established by article 14 and more broadly with the principles underlying the Convention' (paragraph 59). Nor can I accept the majority's view that because it was 'not necessary' to interpret the will to exclude adopted children, 'such an interpretation' amounts to the judicial deprivation of an adopted child's inheritance rights' (paragraph 60).

The majority go on to assert that, even if the will required interpretation, it should not have been interpreted exclusively in the light of the social conditions existing at the time when the will was made or when the testatrix died; any such interpretation should have taken account of the profound social, economic and legal changes which had occurred in the succeeding period of 57 years. In particular, it is suggested that any interpretation should not have overlooked 'the importance of interpreting the testamentary disposition in the manner that most closely corresponds to domestic law and to the Convention as interpreted in the court's case law' (paragraph 62).

As to this argument, I consider that if it was open to the domestic courts, as I believe it was, to endeavour to ascertain the intention of the testatrix in using the disputed clause, it was also in principle open to them to interpret the clause in the light of the social and legal conditions which prevailed at the time when the will was drafted, rather than at the time the clause fell to be examined.

For these reasons, regrettable as the result of the High Court's judgment may seem, I am unable to find that the decision gave rise to a violation of the applicants' rights under article 14 read in conjunction with article 8 of the Convention.

(9) DISSENTING OPINION OF JUDGE GARLICKI

It is with regret that I have to disagree with the majority.

This case relates to two important principles which determine the scope of the court's jurisdiction: the principle of subsidiarity and the principle of state action.

In respect of the former, I fully subscribe to the arguments developed by Judge Bratza that the interpretation of the will or of the relevant principles of domestic law by the national courts cannot be regarded as arbitrary or manifestly erroneous or unreasonable.

In respect of the latter, it should be noted that the case did not involve any direct interference by the national courts with the applicant's article 8 rights. The courts were confronted with a will which contained a clause discriminating against adopted children vis-à-vis biological children. The courts first determined the correct interpretation of the will and, in accordance with that interpretation, gave effect to it. Thus, the real question before our court is to what extent the Convention enjoys a 'horizontal' effect, ie an effect prohibiting private parties from taking action which interferes with the rights and liberties of other private parties. Consequently, to what extent is the state under an obligation either to prohibit or to refuse to give effect to such private action?

It seems clear that the authors of the Convention did not intend this instrument to possess a 'third-party effect' (see A Drzemczewski: The European Human Rights Convention and Relations between Private Parties, Netherlands International Law Review 1979, number 2, page 168). However, under our case law it is obvious that there may be certain positive obligations of the state to adopt measures designed to secure respect for Convention rights, even in the sphere of the relations of individuals between themselves (see *X and Y v Netherlands* [1985] 8 EHRR 235 at paragraph 23). Such 'indirect third-party effect' has been addressed by the court in many different areas, such as the right to life (state obligation to carry out an effective investigation in a case of a murder committed by private persons e.g. *Menson v UK* [2003] ECHR 47916/99, the freedom of expression (*Appleby v UK* [2003] ECHR 44306/98, in which the court indicated that the state may be obliged to adopt 'positive measures of protection, even in the sphere of relations between individuals', paragraph 39), freedom of association (*Young v UK* [1981] 4 EHRR 38 representing the first ruling of this kind), freedom of assembly (*Plattform "Arzte fur das Leben" v Austria* [1988] ECHR 10126/82) and above all the protection of private life (e.g. *Ignaccolo-Zenide v Romania* [2000] ECHR 31679/96 at paragraph 113).

Nevertheless, it seems equally obvious that the level of protection against a private action cannot be the same as the level of protection against state action. The very fact that, under the Convention, the state may be prohibited from taking certain action (such as introducing inheritance distinctions between children—see *Marckx v Belgium* [1979] 2

EHRR 330; *Vermeire v Belgium* [1991] 15 EHRR 488; *Mazurek v France* (App no 34406/97) (1 February 2000, UR)) does not mean that private persons are similarly precluded from taking such action. In other words, what is prohibited for the state need not necessarily also be prohibited for individuals. Of course, in many areas such prohibition may appear necessary and well-founded. However, it should not be forgotten that every prohibition of private action (or any refusal to judicially enforce such action), while protecting the rights of some persons, unavoidably restricts the rights of other persons. This is particularly visible in regard to 'purely' private law relations, such as inheritance. The whole idea of a will is to depart from the general system of inheritance, i.e. to discriminate between potential heirs. But at the same time, the testator must retain a degree of freedom to dispose of his/her property and this freedom is protected by both article 8 and article 1 of Protocol number 1 to the Convention. Thus, in my opinion, the rule should be that the state must give effect to private testamentary dispositions, save in exceptional circumstances where the disposition may be said to be repugnant to the fundamental ideals of the Convention or to aim at the destruction of the rights and freedoms set forth therein. As in respect of all exceptional circumstances, however, their presence must be clearly demonstrated and cannot be assumed.

No exceptional circumstances of the above-mentioned kind existed in the Pla and Puncernau case. The testatrix had taken a decision, which was perhaps unjust, but cannot, even by present day standards, be regarded as repugnant to the fundamental ideals of the Convention or otherwise destructive of Convention rights. Thus, the state was under a duty to respect and give effect to her will and was neither allowed nor expected to substitute its own inheritance criteria for what had been decided in the will. Accordingly, the state cannot be held to be in breach of the Convention by giving effect to this will.

For the appellant:

Information not available

For the respondent:

Information not available

REPUBLIC V COMMISSIONER OF PRISONS EX PARTE WACHIRA

NO. 60 OF 1984; [1984] LLR 5979 (HCK)

[1] Constitutional Law – Fundamental Rights and Freedoms – Rights to liberty – Requirement of a detention order – Whether non compliance with the requirements of a detention order renders it invalid.

Editor's Summary

The applicants had been detained under Regulation 6 of the Public Security (Detained and Restricted) Regulations.

They have made an application for a writ of habeas corpus and subjiciendum on the grounds that:

- (1) The statements served on the detainees failed to specify in detail the grounds of detention.
- (2) Statements were not served within 5 days as required by law.
- (3) Notification of the detainees were not published in the Gazette within 14 days of commencement of detention as required by section 83(2) of the Constitution.

Held – The date of the detention order where a person is already in custody begins to run as prescribed by Constitution after service of the detention order.

The Constitution, at section 83(2) provides that the grounds upon which a person detained must be specified in detail.

Insufficiency of the statement of the grounds is a mere matter of procedure and is not fatal as to render the detention order invalid.

The application for a writ of Habeas Corpus and subjiciendum to issue is accordingly refused.

Cases referred to in Judgment

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means explained; “**F**” means followed; “**O**” means overruled)

East Africa

Ooko v Republic High Court civil case number 1159 of 1966 (UR)

Uganda v Commissioner of Prisons ex parte Matovu [1966] EA 514

United Kingdom

Attorney General of St Christopher, Nevis and Anguilla v Reynolds [1979] 3 All ER 129

Das v State of West Bengal [1975] 1 AIR 550 (SC)

Herbert v Phillips and Sealey [1967] WIR 435

Others

Attorney General of Zambia v Chipango [1971] ZR 1

Mutale v AG of Zambia [1976] ZR 139

Judgment

SIMPSON CJ: On 13 March 1984 following an *ex parte* application on behalf of four persons detained under regulations 6 of the Public Security (Detained and Restricted Persons) Regulations (LN 234 of 1978 for leave to issue a writ of *habeas corpus subjiciendum* granted leave in the form of an order requiring the respondent, the Commissioner of Prisons, to show cause why Kamonji Kang'aru Wachira, George Moseti Anyona, Dr Edward Akeng'o Oyugi and Koigi Wa Wamwere should not be released.

In compliance with that order the Commissioner of Prisons appeared represented by the Attorney-General who was assisted by Mr *Chunga*, Assistant Deputy Public Prosecutor.

Mr Kiraitu *Murungi* and Mr Gibson Kamau Kuria, the advocates representing the detainees, relied on four grounds on which they contended that the detentions were illegal. These grounds are set out in an affidavit which was sworn by themselves. They may be summarized as follows:

- (1) The statements served on the detainees as required by section 83(2)(a) of the Constitution failed to specify in detail the grounds on which they were detained.
- (2) These statements were not served within 5 days of the commencement of their detention in accordance with the provisions of section 83(2)(a).
- (3) Notifications of the detentions of two of the detainees, namely, Wachira and Oyugi, were not published in the Gazette within 14 days of the commencement of their detention thus contravening the provisions of section 83(2)(b) of the Constitution.
- (4) The Public Security (Detained and Restricted Persons) Regulations 1978 (LN 234 of 1978) and the Public Security (Detained and Restricted Persons) Rules 1978 (LN 235 of 1978) were not properly laid before the National

Assembly in accordance with the provisions of section 6(1) of the Preservation of Public Security Act (Chapter 57).

The respondent having filed an affidavit to the effect that in the case of each detainee notification of his detention had been duly published in the Gazette within 14 days as required by section 83(2)(b) of the Constitution the Attorney-General sought to know whether Mr Kamau Kuria abandoned his third ground. The reply was in the negative and by consent this ground was argued first.

It is convenient at this stage to set out the provisions of section 83 in full:

- “83(1) Nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of section 72, 76, 79, 80, 81 or 82 when Kenya is at war, and nothing contained in or done under the authority of any provision of Part III of the Preservation of Public Security Act shall be held to be inconsistent with or in contravention of those sections of this Constitution when and in so far as the provision is in operation by virtue of an order made under section 8(5)
- (2) Where a person is detained by virtue of a law referred to in sub-section (1) the following provisions shall apply:
- (a) he shall, as soon as reasonably practicable and in any case not more than five days after the commencement of his detention, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is detained.
 - (b) not more than fourteen days after the commencement of his detention, a notification shall be published in the Kenya Gazette stating that he has been detained and giving particulars of the provisions of law under which his detention is authorized;
 - (c) Not more than one month after the commencement of his detention and thereafter during his detention at intervals of not more than six months, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person appointed by the President from among persons qualified to be appointed as a judge of the High Court;
 - (d) He shall be afforded reasonable facilities to consult a legal representative of his own choice who shall be permitted to make representations to the tribunal appointed for the review of the case of the detained person; and

- (e) At the hearing of his case by the tribunal appointed for the review of his case he shall be permitted to appear in person or by a legal representative of his own choice.
- (3) On a review by a tribunal in pursuance of this section of the case of a detained person, the tribunal may make recommendations concerning the necessity or expediency of continuing his detention to the authority by which it was ordered but, unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations.
- (4) Nothing contained in sub-section (2)(d) or (a) shall be construed as entitling a person to legal representation of public expense."

In their affidavit Mr *Murungi* and Mr Kamau Kuria stated that Mr Wachira was arrested on 29 June 1982, and served with his detention order dated 13 July 1982, and statement on 15 July 1982. His detention was notified in the Gazette on 13 July 1982.

Mr Oyugi was arrested on 15 June 1982, and served with his detention order on 13 July 1982, and statement on 15 July 1982. His detention was notified likewise on 13 July 1982.

Mr Kamau Kuria contended that the date of arrest was the date of the commencement of the detention in each case. According to the Attorney-General the detention of each detainee commenced with service on him of the detention order.

"Detention" in sub-section (2) of section 83 clearly means detention "by virtue of a law referred to in sub-section (1)."

Sub-section (1) refers to the Preservation of Public Security Act. The detentions complained of were detentions under Regulation 6 of the Public Security (Detained and Restricted Persons) Regulations made under that Act. Regulation 6 reads as follows:

- "6(1) If the Minister is satisfied that it is necessary for the preservation of public security to exercise control, beyond that afforded by restriction order, over any person may order that person shall be detained.
- (2) Where a detention order has been made in respect of any person, that person shall be detained in a place of detention in accordance with these Regulations, for as long as the detention order is in force, and, while so detained, shall be deemed to be in lawful custody.
- (3) The Minister may at any time revoke a detention order.

An arrest and custody before the date of the detention order is not detention by order of the Minister under the Preservation of Public Security Act. A person may be arrested in the course of police enquiries on suspicions of the commission of a criminal offence or of activities which might justify a report to the Minister responsible for making detention orders. Subsequently such a person while still in custody might be served with a detention order.

The Public Security (Detained and Restricted Persons) Regulations make provision in Regulation 10(1) for serving a detention order as soon as reasonably practicable and in any case not more than 5 days after the commencement of his detention. The detained persons in the present case were duly served. Detention under the Preservation of Public Security Act commences in my view on the date of the detention order where the person to be detained is already in custody and in other cases with the services of the detention order. I am fortified in this view by the following statement of the High Court of Uganda (Sir Udo Udoma CJ, Sheridan J (as he then was) and Jeffrey's Jones, J) in *Uganda v Commissioner of Prison (ex parte Matovu)*, (1966) EA 514 at page 545:

“To constitute a detention under register 1 of the emergency powers (detention) Regulation 1966 an order signed by the Minister authorizing such a detention must be served on the detainees and it is after such service that it could be said that the person was detained by the Minister in the exercise of his powers under the Regulations; and it is only then that the time prescribed under the Constitution would begin to run.”

It is not disputed that in the case of each of the four detained persons the detention was notified in the Gazette within 14 days of the date of the detention order and after service of the detention order. Thus ground 3 fails.

The written statements served as required by section 83(2)(a) on all four persons were in identical terms, as follows:

“You have engaged yourself in activities and utterances which are dangerous to the good government of Kenya and its institutions and in the interests of the preservation of public security your detention has become necessary.”

Under the provisions of section 83(2)(a) of the Constitution the grounds upon which a person is detained must be specified in detail.

It is contended on behalf of the four detained persons:

- (a) That these statements are not sufficient to comply with the provisions of section 83(2)(a), and
- (b) That compliance is mandatory and insufficiency of details invalidates the detention orders.

Section 83(2)(a) has its counterpart in Constitutions of several Commonwealth countries including the former St Christopher, Nevis and Anguilla Constitution. The object of this provision was explained by Lewis CJ, in *Herbert v Phillips and Sealey* [1967] 10 WIR 435 (at page 452).

“The object of requiring a detainee to be furnished with a statement specifying in detail the grounds upon which he is detained” the Chief Justice said, “is to enable him to make adequate representations to the independent and impartial tribunal which the same section of the Constitution requires to be set up for the review of his case. The statement is not required to contain the evidence which has come to the knowledge of the Governor and which it may be against the public interest to disclose. But it must, in detailing the grounds for detention, furnish sufficient information to enable the detainee to know what is being alleged against him and to bring his mind to bear upon it. A ground which is vague, roving or exploratory is insufficient to enable the detainee to know what is being alleged against him and to bring his mind to bear upon any acts or words of his which may possibly have attracted the attention of the authorities and from which the Governor has drawn conclusions adverse to him which satisfy the Governor that it is necessary to exercise control over him. With such a ground an innocent person would not know where to begin with the representation of his case to the tribunal.”

With that statement I am in full agreement. It was approved also by Bweupe J in *Mutale v AG of Zambia* [1976] ZR 139 at page 144 and no authority to the contrary had been brought to my attention. I do not agree with Magnus J who in another Zambian case said the grounds “must be at least as particularized as they would have to be in a pleading in an ordinary action: (*AG of Zambia v Chipango* [1971] ZRI). Nor do I accept the statement of Bhagwati J, delivering the judgment of the Court in *Khudiram Das v State of West Bengal* [1975] AIR 550 (SC) that:

“It is obvious that the ‘grounds’ mean all the basic facts and materials which have been taken into account by the detaining authority in making the order of detention and on which, therefore, the order of detention is based.”

To set all the basic facts and materials would clearly in most cases be prejudicial to security and contrary to public policy.

A number of authorities were cited by Mr Kamau Kuria as examples of statements which were held to be insufficient. In the *Matovu* case (*supra*) the statement furnished to him read:

“The grounds on which you are being detained are that you are a person who has acted or is likely to act in a manner prejudicial to the public safety and maintenance of public order.”

The court was not satisfied that the statement contained sufficient detail of the grounds for the detention of the applicant.

In *DPP Ooko v The Republic of Kenya* High Court civil court number 1159 of 1966 (UR) the statement supplied to the plaintiff read as follows:

“As a leading member of the trade union movement you have consistently pursued the role of an agitator and have sabotaged not only good relations in the labour field but also the labour policy of the Government by threatening illegal strikes in essential services thus adversely affecting the economy of the country and thereby the security of the Republic.”

Rudd J held that this was not sufficient.

In the instant case the Attorney General argued strongly that the statement was sufficient. And they might disclose the manner in which the information was obtained and perhaps endanger the person who obtained the details. I am not however convinced that the public interest requires that no further details be given. As was said by Lewis CJ in the *liebert* case the statement must “furnish sufficient information to enable the detainee to know what is being alleged against him and to bring his mind to bear upon it”.

The stereotype statement served on the four detainees merely informs them that they have engaged themselves in activities and utterances which are dangerous to the good Government of Kenya. No indication is given of the nature of these activities or utterances. This statement to my mind contains insufficient information to enable the detainees to know what is being alleged against them. Further information could surely have been furnished without endangering the security of the State or the safety of informants.

Were the detention orders in consequence invalid?

Mr Kamau Kuria relied *inter alia* on *AG of St Christopher v Reynolds* [1979] 3 All ER 129 at page 141, where the Privy Council considered a similar provision requiring the grounds of detention to be specified in detail. With regard to the statement in that case Lord Salmon had this to say:

“It is very short and its barren words bear repetition:

“That you John Reynolds during the year 1967, both within and outside of the State, encouraged civil disobedience throughout the State, thereby endangering the peace, public safety and public order of the State.

It is difficult to imagine anything more vague and ambiguous or less informative than the words of this notice. It was indeed a mockery to put it forward as specifying in detail the grounds on which Mr Reynolds was being detained.

It seems plain to their Lordships that the irresistible inferences to be drawn from this notice is that there were no grounds, far less any justifiable grounds, for detaining Mr Reynolds. Had there been any such grounds they would surely have been set out in the notice. The fact that no grounds of any kind have been put forward on behalf of the Governor to justify him making a detention order against Mr Reynolds, and all the circumstances of the case, raise or irresistible presumption that no such grounds have no doubt that the detention order was invalid and that Mr Reynolds was unlawfully detained.”

In that case not only were there no grounds for detention shown in the statement but no grounds were shown in a subsequent inquiry and in an action for false imprisonment. It was the complete failure to put forward grounds which led their Lordships to conclude that no grounds existed and that accordingly the detention order was invalid. It was not merely insufficiency of detail.

In the *AG of Zambia v Chipango's case* (*supra*) it was held that failure to furnish a statement of the grounds for detention within the prescribed 14 days rendered the detention order invalid.

While the foregoing two cases can be distinguished other authorities the *Mutale* case (*supra*), *Herbert v Phillips and Sealey* (*supra*) and *Das v West Bengal* (*supra*) cited by Mr Kamau Kuria support his submissions that mere insufficiency of detail renders the detention invalid.

The East African authorities on which the Attorney-General relied I find more persuasive however. In the *Matovu* case Sir Udo Udoma CJ, reading the judgment of the High Court said (at page 546):

“Insufficiency of the statement of the grounds of detention served on the applicant is mere matter of procedure. It is not a condition precedent but a condition subsequent. We therefore hold that it is not fatal to the order of detention made by the Minister.”

With that statement I respectfully agree. The furnishing of a statement specifying the grounds of detention within 14 days mandatory and failure would no doubt render the detention order invalid as was held in *Chipango's* case. Insufficiency is a relative term. In some cases (such as the present) insufficiency is obvious on the fact of the statement. In others owing to varying circumstances a stereo type statement which to one detainee might contain information sufficient to enable him to know what is being alleged against him might convey nothing to another. In such a case the court has to base its decision on the evidence of the detainee assessing his credibility, knowledge and intelligence a far from sound basis on which to make a finding of invalidity. The defect according to the Uganda High Court is curable by an

application to the court under the provisions of the Constitution for directions.

In the *Ooko* case, Rudd J a most experienced judge came to a similar conclusion:

“The plaintiff he said “argued that failure to state sufficient detailed ground rendered his detention unlawful. I think there could well be a great deal of substance in such a submission if no written statement at all of the grounds for the detention had never (sic) been given. In this case there was a statement of grounds though not in sufficient detail.”

In such a case he thought the plaintiff's remedy was to apply to the High Court for further and better particulars of the grounds for the detention.

In my opinion insufficient of details in a statement furnished under section 83(2)(a) of the Constitution does not render the detention invalid. Since the object is to enable the detainee to know what is being alleged against him the remedy of the detainee is to seek further and better particulars. I agree with the Attorney General that the appropriate forum for such an application is not the High Court but the review tribunal referred to in paragraphs (c), (d) and (e) of section 83(2).

I hold accordingly that ground (1) fails and since the statements were served within 5 days of the commencement of detention ground 2.

I turn now to the last ground. Section 6(1) of the Preservation of Public Security Act (Chapter 57) provides as follows:

“All subsidiary legislation shall be laid before the National Assembly as soon as may be after it is made, and, if the Assembly within the period of twenty days commencing with the day on which the assembly first sits after the subsidiary legislation is laid before it, resolves that it be annulled, it shall cease to have effect.”

An annulment resolution is known as a negative resolution. Where a resolution is required to bring subsidiary legislation into force it is known as an affirmative resolution.

The Public Security (Detained and Restricted Persons) Regulation 1978 (LN 234 of 1978) and the Public Security (Detained and Restricted Persons) Rules 1978 (LN 235 of 1978) are subsidiary legislation. It is not disputed that these Regulations and Rules were laid on 3 November 1978. Mr Kiraitu *Murungi* who argued this ground submitted that it was mandatory that they should be laid to 20 days and this is not complied with.

The National Assembly was adjourned on 3 November (a Friday) and prorogued on 7 November without sitting again. The next sitting was on 6 March 1979. The Regulations and Rules were never laid before Parliament at

the next or any subsequent session. They therefore became invalid and detention orders made became null and void *ab initio*.

Mr Murungi relied on passages in *Erskine May's Parliamentary Practice* (19 ed).

At page 250 the learned author says:

“The effect of a prorogation is at once to suspend all business until Parliament shall be summoned again. Not only are the sittings of Parliament at an end, but all proceedings pending at the time are quashed. Every Bill must therefore be renewed after a prorogation as if it were introduced for the first time.”

The laying of subsidiary legislation before the Assembly, he submitted, was a proceeding pending at the time of prorogation and since the Regulations and Rules in question were not laid again at the next session they were quashed. No authority was cited for this proposition.

The correct position is I think as stated by the Attorney General in his lucid submissions. An adjournment is an interruption in the course of a session. A prorogation terminates a session and the period between the prorogation of the National Assembly and its reassembly in a new session is termed a “recess” (See *Erskine Hay* at page 259). Once subsidiary legislation has been laid before the House that business (if it can be so described) has been concluded. It does not continue from day to day. The subsidiary legislation in question would again become the business of the House if a member were to move that it be annulled. Once laid subsidiary legislation continues to lie for the 20 days necessary to allow a member to move its annulment should be so inclined. Such subsidiary legislation is valid from the date it is made and continues to be valid unless a resolution for its annulment is passed within 20 days. The period of 20 days commences with the day on which the Assembly first sits after the Subsidiary legislation is laid before it. In this instance Parliament having been in adjournment between 3 November the day it was prorogued that date was 6 March 1979. Since this followed a prorogation not a dissolution the membership was unchanged. Until 25 March 1979, therefore, a member could have moved a resolution for annulment. This was not done.

In England it is provided by legislation that where a negative resolution may be moved no account is taken of any time. Parliament is dissolved or prorogued or during which both Houses are adjourned for more than 4 days (Statutory Instruments Act 1946, section 7). Such a provision would have been unnecessary if subsidiary legislation laid before the House were regarded as proceedings pending at the time of prorogation which are quashed by prorogation.

No such provision is to be found here in Kenya but since time did not start to run until 6 March 1979, it is unnecessary for me to decide whether or not time runs during an adjournment or prorogation. Obviously it is desirable that it should not do so otherwise members might be deprived of an opportunity to move a resolution for the annulment of subsidiary legislation laid shortly before prorogation. It is interesting to observe that in section 85 of the Constitution where it is provided that an order of the President bringing into operation Part III of the Public Security Act shall cause to have effect unless approved within 28 days by a resolution of the National Assembly no account is to be taken of any time during which Parliament is dissolved. Nothing is said about time during which Parliament is prorogued. Perhaps the legislature assessed that time would not run during the recess.

I am satisfied that section 6(1) of the Preservation of Public Security Act was duly complied with. If I am wrong the question then arises what is the effect of failure to comply? The answer depends on whether the provisions of the Act are mandatory or directory. It has been held in England that a requirement that Statutory Instruments be laid before Parliament subject to negative resolution is in the absence of express stipulation to the contrary directory only (see *Law and Orders by CK Allen* (4 ed) at page 163).

Erskine May says:

“Breach of statutory duty to lay an instrument before parliament will not of itself invalidate the instrument though it may amount to a misdemeanour.”

Thus even if I were not satisfied that section 6(1) had been complied with I would have held that the Regulations and Rules were not thereby rendered invalid. Ground 4 therefore fails.

The application for a writ of *Habeas Corpus and Subjiciendum* to issue is accordingly refused and the applicants are ordered to pay the costs of the respondent. In view of the nature and importance of the case costs will be taxed on the higher scale and there will be a certificate for two counsels.

For the appellants:

Mr Murungi

For the respondent:

Mr Chunga

REPUBLIC V HUSSEIN
NO. 54 OF 1998 [1988] LLR 5977 (HCK)

[1] Constitutional Law – Fundamental Rights and freedoms – Limitation to enjoyment of right and freedoms.

Editor's Summary

The accused person was arrested on 11 December 1987 on suspicion of murder of his wife but was charged much later on 17 December 1987.

The accused has raised an objection as to the admissibility of his confession at the ground *inter alia* that his detention in police custody for 6-7 days had tainted the voluntary nature of the oral statement made by the accused on 17 December 1987.

Held – Rights and freedoms in Chapter V of the Constitution are subject to respect for the rights and freedoms of others and for the public interest.

In the circumstances of the case, it would not have been wise to let the accused go scott free whilst the cloud of suspicion was hovering over the accused.

The circumstances ought to be weighed in the scale of public interest as against the fundamental right of the accused.

Objection overruled.

Cases referred to in ruling

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means explained; “**F**” means followed; “**O**” means overruled)

East Africa

Anyangu v Republic [1968] EA 239

Bassan and Kiambu v R [1961] EA 521

Bassan v Republic [1961] EA 521

Ekai v Republic [1981] KLR 56

Karuma v Republic (1955) EACA 364

Kuruma v Reginam (1955) 22 EACA 364

Musai Wambua v Republic High Court criminal appeal number 1086 of 1966 (UR)

Ngumbao and another v Republic (1975) EACA 282
Ngumbao v Republic [1975] EA 282
Njuguna s/o Kimani and others v Republic (1954) 21 EACA 316
Ochieng v Uganda [1969] EA 1
Republic v Kaperere s/o Mwaya (1948) 15 EACA 56

Ruling

ABDULLA J: The accused, Mohammed Shiraz, was arrested on 11 December 1987 at about 3:30pm by CI Mboshe, the investigating officer and detained upon suspicion of murder of his wife Zainab. He was in police custody and on 17 December 1987, at about 10:30am Chief Inspector Mboshe, who had received a tip off that the accused owned a private store along Baridi Road in Pangani, asked the accused about these keys. The accused told him that the keys were with someone at River Road but on the way he told the Chief Inspector that he had a confidential request to put to the Chief Inspector. Thereupon they returned to Kasarani Police Station where the accused was invited to the office of the Chief Inspector, after the Chief Inspector had dealt with some members of the public. The Chief Inspector asked the accused what the confidential request was and the accused started confessing to murder of his wife and that everything was in the store. Thereupon, the Chief Inspector interrupted the accused and cautioned him in the usual manner. The accused who understood the caution continued to plead with the Chief Inspector and offered to give him KShs 200 000 which were in the store, and promised to later give to the Chief Inspector some more to make it KShs 500 000.

They then drove to Pangani to the house of a cousin of the accused, and from a bag, behind the door of a bedroom the accused removed the keys and at the store on Baridi Road the accused opened the door with these keys.

Inside the store, the accused pointed out various places and items used in connection with the murder of his wife and made oral statements, amounting to confessions, in respect of various such places and items in the store.

The defence has objected to admissibility of such statements on the grounds that:

- (a) These were obtained against the spirit of Judges Rules.
- (b) These were obtained in breach of fundamental constitutional rights of the accused person.
- (c) There was lack of fair play as far as the rights of the accused were concerned.
- (d) There was abuse of procedure

- (e) That failure to imply strictly with the procedure tends to taint the voluntariness and legality of the said statements.

It is conceded on behalf of the defence that there is no allegation of torture but the gravamen is more civilized irregularities which tend to establish that such oral statement are not admissible.

During the trial, the Chief Inspector gave evidence as to circumstances as above which led to the discovery of certain facts in the store and the oral statements of the accused with regard to such discovery.

It may be noted that during cross-examination of the CI in trial within trial, certain discrepancies and important omissions surfaced between his these. I do not consider any of these material or vital in so far as what transpired before the trip to the store and as to caution administered before the trip to the store.

The accused made a lengthy statutory statement in which he described the circumstances of this arrest, detention and how on 17 December 1987, he was questioned about the store and how they proceeded to the store after he the accused obtained the key to the store from his cousin's house. Although there are certain variations between the evidence of CI and the statutory statement of the accused with regard to conversation which took place, there is no dispute that the store was visited after the accused obtained the keys from his cousin's place. Of course, the accused has retracted the statements amounting to confession.

Both Mrs *Njogu* for the Republic and Mr *Ghalia* for the defence made elaborate submissions with regard to the admissibility of the oral statement made by the accused and where appropriate strengthened their submissions with decided cases.

Mrs *Njogu* relied on *Sarkar on Evidence*, (13 ed) as well as *Ochieng v Uganda* (1969) EACA page 1 and *Ngumba v Republic* (1975) EACA page 282.

Mr *Ghalia* heavily relied on the well followed principles with regard to confessions in *Njuguna v Republic* [1954] EA page 316 as well as cases cited in *Durand's Evidence for Magistrate* Part II at page 253 where *Republic v Kaperere s/o Mwaya* (1948) EACA pages 57-58 was cited with regard to dangers of relying on oral confessions as quoted in *Taylor on Evidence* (11 ed) page 582 and at page 273 where CI Ainley in *Wambua Musai v Republic* High Court criminal appeal number 1086 of 1966 (UR) discusses the procedural difficulties under section 31 of the Evidence Act. Mr *Ghalia* also drew my attention to a passage in Court of Appeal, criminal appeal number 115 of 1981; *Paul Nakwala Ekai v Republic* where Law, Potter JJA and Simpson AJA suggested that consideration be given to amending the Evidence Act to

provide that no statement in the nature of a confession made to a police officer of whatever rank be admissible in evidence against a person accused of a criminal offence.

The crux of Mr *Ghalia*'s submissions is that the prolonged detention of the accused was unlawful and therefore whatever confession the accused person made to police officer of whatever rank must be excluded.

In doing so, Mr *Ghalia* impounded on the provisions of the Constitution with regard to fundamental rights and section 36 of the Criminal Procedure Code. He also compared the enormous authority and power of the police to investigate the crime with the fundamental rights of the individual. He was of the view that if police crossed that line – the line of protection of the suspect – then the powers of the police are clipped by the law. He set out the stages of investigation by the police and said that police, at the stage of trying to find the author of a crime had enormous powers, but once the suspect was found, his rights were most vital. Although police were entitled to question the suspect after caution, the rights of suspects may not be disregarded, especially where the gravity of crime is enormous. The moment when the police have sufficient evidence, the law demands that the suspect be charged forthwith because it is the right of the accused person to know that he is in jeopardy of being charged. It is unfair and wrong to delay charging the accused because once he is charged with an offence, he cannot be interrogated. Mr *Ghalia* contended that it is only after the accused is charged, that he may be arrested as the rights of the accused are greater upon arrest than at the stage when he ought to be charged.

According to Mr *Ghalia*, the police jumped to the last stage of arresting him. He was never charged and his right to know the reason for arrest was jeopardized. Moreover, he could not be questioned after being charged and should have been taken to court within 24 hours. To suggest that it was impracticable to take the accused to court within 24 hours from a distance of 3 km was eyewash and an excuse to detain him longer than the police were entitled. Mr *Ghalia* deplored the practice of prolonged detention of suspects in police custody which provoked frequent complaints of torture and even resulted in a murder as in Mombasa case.

It is Mr *Ghalia*'s contention that the police have no right to arrest a person on suspicion as there is no provision for arrest of a suspect.

It is Mr *Ghalia*'s submission that the accused ought to have been charged and it was the duty of CI Mboshe to charge the accused, the moment CI saw blood on the floor of the store and the accused made some incriminatory statement about it.

Relying on *Njuguna v Republic (supra)*, Mr *Ghalia* asserted that the detention of the accused for 6 to 7 days was a long time, there was improper or unlawful questioning or improper methods were used, there was no right to interrogate when in police custody and in the instant case the interrogation was consistent.

Mr *Ghalia* argues that the prolonged detention of the accused without charging amounted to fundamental breaches of his rights to be charged, his rights not to be interrogated and his rights to be taken to court within 24 hours.

Quoting from *Wambua Musai v Republic*, he suggests that CJ Ainley properly suggests severance of discovery of fact from confession, when considering the procedure under section 31 of the Evidence Act.

He urges the court to rule that the incriminatory statements accompanying the discovery of facts be held inadmissible.

With regard to fundamental rights and freedom of the individual, in Chapter V of the Constitution, it must be emphasized that these rights and freedoms are subject to respect for the rights and freedoms of others and for the public interest and the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

In the instant case, a gruesome and revolting murder was perpetrated. As observed in *Njuguna's* case, the awfulness of the crime is irrelevant to the standard of proof required of the prosecution. It is a matter of grave concern that the courts should administer justice according to law. CI Mboshe had reasonable suspicions since he was briefed on 8 December 1987 that the accused may be connected with the crime. He took the accused in police custody on 11 December 1987 on such suspicion and the police were looking for a break. The break did not come until the police received a tip off about the private store of the accused. It is the discovery of the facts in that store which founded the basis of evidence to charge the accused with the offence. Until then, there was no sufficient evidence for the police to bring the accused person to the court.

In these circumstances, would it have been wise to let the accused go Scot free whilst the cloud of suspicion was hovering over the accused? What would be the consequences if the fundamental rights of the accused were to be respected to the letter. One must not lose sight of the fact that the accused offered a very substantial sum of money to CI Mboshe which was in the store in order to give him (the accused) opportunity to clean up the place. Must not these circumstances be weighted in the scale of public interest as against fundamental rights of the accused person?

Be that as it may, it may be useful to examine Mr *Ghalia's* contention that police have no right to arrest a suspect that an arrested person must be charged forthwith and that such person must be brought to court within 24 hours and that the prolonged detention of the accused was unlawful.

Under section 29(a) of the Criminal Procedure Code, a police officer is empowered to arrest any person whom he suspects upon reasonable grounds of having committed a cognizable offence. Murder is a cognizable offence.

Under section 72(1) of the Constitution under Chapter V dealing with protection of fundamental rights and freedoms of the individual, no person shall be deprived of his personal liberty save as may be authorized upon reasonable suspicion of his having committed, or being about to commit a criminal offence under the law of Kenya.

Reading these two provisions together, especially the phrases used in either provisions with regard to suspicion upon reasonable grounds or upon reasonable suspicion, can it be said that the police have no right to arrest a suspect until they are in a position to charge the suspect forthwith with offence? If so, the provisions of section 36 of the Criminal Procedure Code with regard to detention of persons arrested without warrant will seem to be redundant and of no application. Section 36 as it was in December 1987 before the amending Act 13 of 1988 read:

“When a person has been taken into custody without a warrant for an offence other than murder or treason the officer in charge of the police station to which the person has been brought may in any case and shall, if it does not appear practicable to bring that person before an appropriate subordinate court within twenty four hours after he has been so taken into custody, inquire into the case, and unless the offence appears to the officer to be of a serious nature, release the person on his executing a bond, with or without sureties, for a reasonable amount to appear before a subordinate court at a time and place to be named in the bond, but where a person is retained in custody he shall be brought before a subordinate court as soon as practicable.

Provided that an officer in charge of a police station may release a person arrested on suspicion on a charge of committing an offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge.”

It would appear from the above, that a person arrested upon suspicion may be taken into custody and unless the offence appears to be of a serious nature, shall be released on bond if it does not appear practicable to bring that person to court within twenty four hours. It is to be noted that the officer in charge of the police station is required to inquire into the case before he exercises his discretion to release the person on bail. It would appear that where the

offence appears to be of a serious nature the person may be detained in custody and shall be brought before a court as soon as practicable. The officer in charge also has discretion after due police inquiry to release a person if in his opinion insufficient evidence is disclosed on which to proceed with the charge.

It is therefore evident that it is not correct to say that the police have no right to arrest a suspect until they are in a position to charge the suspect forthwith.

Moreover, with regard to bringing the person so arrested upon suspicion, the obligation to bring such person to court within twenty four hours, in my view, is imposed for an offence which does not appear to be of a serious nature. As regards the offence of murder and treason, it would seem that the requirement to bring the person suspected of such offence within twenty four hours does not apply. It would be ideal to bring all persons suspected of having committed an offence to court within twenty four hours but from experience it is well known that it is not practicable to do so. This does not apply. It would be ideal to bring all persons suspected of having committed an offence to court within twenty four hours but from experience it is well known that it is not practicable to do so. This does not mean that the court approves or condemns the failure of the police to bring such persons to court within twenty four hours. Each case must be looked at from its own circumstances. It cannot be said that a person who is detained in police custody for more than twenty four hours is so detained unlawfully unless after considering all the circumstances of the case, the court comes to conclusion that the police acted in unjustified disregard of the provisions of the Criminal Procedure Code.

It may be argued that the provisions of section 36 of the Criminal Procedure Code offends the provisions of section 72(3) of the Constitution which imposes the burden of proving that the arrested or detained person has been brought before a court as soon as reasonably practicable rest upon the person who alleges such compliance unless such arrested or detained person is brought before a court within twenty four hours. If the two provisions are read together, it may seem that they are not in conflict with each other. As said earlier, each case must be considered or looked at from its own circumstances. In doing so, the phrase "as soon as reasonably practicable" must be considered in its wider connotations. It would be unreasonable to give too strict or narrow an interpretation to the phrase, especially when analysing the same with regard to detention of a person reasonably suspected of murder or treason pending due police inquiry as to sufficiency or otherwise of the evidence. Regard must also be had, as earlier said to particularity of each individual case. It is to be noted that by amending Act 4 of 1988, the burden

of proving compliance with section 72(3) of the Constitution in the case of person arrested or reasonable suspicion of having committed an offence punishable by death is imposed if the person is not brought before the court within fourteen days. It is my considered view that having regard to all the circumstances of this case, the detention of the accused person for six or seven days was neither unlawful nor was the same infringement of the fundamental rights of the accused under the Constitution nor does it impinge the Judge Rules.

Although in *Ngumbao and another v Republic* (1975) EACA 282, where Mr *Ghalia* argued the appeal on behalf of the appellants, the Court of Appeal strongly deprecated the practice of rounding up all and sundry who may be connected, however with a criminal investigation, and detaining them unlawfully in police custody for questioning. It held that “confession made or an exhibit discovered, whilst a person is in unlawful custody, is not in itself a bar to the production and admission or such confession or evidence”, citing with approval the decision in *Bassan v Republic* [1961] EA 521 and *Karuma v Republic* (1955) EACA 364.

As regards the procedure applicable under section 31 of the Evidence Act, when any fact is deposed to as discovered in consequence of information received from a person accused of an offence, I find it difficult to grasp the reasoning of CJ Ainley in *Wambua Musa’s* case that a stringent limitation may be imposed on what a witness is giving an account of the information may say and that the fact discovered may be served from the incriminatory statement made by the accused person with regard to discovery of such fact. This is so because section 31 allows such information to be not only proved but it may be so whether it amounts to a confession or not. If the information were to be served from the statement it could amount to confession of the discovery of fact which could be rendered meaningless such as, “This is the board” without adding “with which I cut the string to tie the feet and hands of the deceased.”

It is true from CJ Ainley in 1966 when he described Part III of Evidence Act dealing with confessions as highly artificial approach to evidence adopted by the legislature in Part III of Evidence Act to the suggestion of Court of Appeal in *Ekai v Republic (supra)* in 1981 that Evidence Act needs to be amended to exclude statement in the nature of confession made to a police officer of whatever rank. The judges were not of evidence of confessions. Nevertheless, such laws of evidence on confession still stand and are in force. Justice must be administered according to the law.

Upon consideration of all the circumstances, I am of the view that the detention of the accused person in police custody for 6 to 7 days had not in any way tainted the voluntary nature of the oral statement made by the

accused to IC Mboshe on 17 December 1987 outside and inside the store on Baridi Road.

As regards the compliance with Judges Rules, I rule that there was substantial compliance with the same. In any event, the following comment in *Ekai's case* is to rest any apprehension that the Judges Rules were not strictly complied with:

“The Judges Rules, as was made clear in *Anyangu case* (*Anyangu and others v Republic* [1968] EA 239), are only rules of practice and it is always in the discretion of the trial judge to admit in evidence statement made by the accused persons although they are not obtained strictly in accordance with the Rules, provided of course (as was the case here) that the judge is satisfied that the statements were made voluntarily and were substantially true.”

I rule that such statements amounting to confession are admissible in evidence.

For the appellant:

Mrs Njogu

For the respondent:

Mr Ghali

RUHI V REPUBLIC

NO. 428 OF 1985; [1985] LLR 5984 (HCK)

[1] *Constitutional Law – Fundamental Rights and Freedoms – Rights to liberty – Whether right to bail pending trial is absolute – Limitations to Fundamental rights and freedoms.*

Editor's Summary

The three applicants were charged with taking part in unlawful assembly contrary to Public Order Act. They pleaded not guilty and applied for bail twice which applications were denied.

They have now appealed against the decision.

Held – The provisions of the Constitution do not provide that the right to bail pending trial is absolute.

The right to liberty is a fundamental right and freedom as set out in section 70 of the Constitution. It is however not absolute and subject to rights and freedoms of others and of public interest.

Fundamental rights and freedoms are subject to limitations set out in sections 71 to 83 of the Constitution which are designed to ensure that the enjoyment of those rights and freedoms by individuals does not prejudice the rights and freedoms of others.

Appeal and bail application disallowed.

Cases referred to in judgment

(“A” means adopted; “AL” means allowed; “AP” means applied; “APP” means approved; “C” means considered; “D” means distinguished; “DA” means disapproved; “DT” means doubted; “E” means explained; “F” means followed; “O” means overruled)

East Africa

Banks v Republic [1917] 12 LLR 75

Clewer v Republic [1953] 37 LLR 35

Nathan House v Republic [1922] 16 LLR 51

Republic v Burns [1958] EA 142

Kabeni v Republic [1970] EA 503

Judgment

COCKAR AND TORGBOR JJ: All the fourteen appellants (who will also be referred to as accused) were convicted on count 1 with the offence of unlawfully and jointly converting to their own use a motor vehicle, the

property of University of Nairobi, contrary to section 294 of the Penal Code. Each was sentenced to a term of 6 months' imprisonment.

Accused numbers 12 and 13 were convicted on counts 2 and 4 respectively of being in possession of *cannabis sativa* (bhang) contrary to section 10(2) as read with section 18(2) of the Dangerous Drugs Act (Chapter 245). Each was sentenced to 6 month's imprisonment to run consecutively to the sentence on count 1.

Accused number 12 was also convicted of driving a motor vehicle on a public road without valid driving licence contrary to section 30(1) of the Traffic Act (Chapter 403) punishable by section 41 of the said laws and sentenced on count 1 only.

All the appellants except accused number 3 had filed petitions of appeal in person within the prescribed period. Supplementary petitions of appeal in respect of each of these 13 appellants were subsequently filed by Messrs Simiyu Wetangula and Company on 7 June 1985.

Accused number 3 had filed an appeal on 28 May 1985 which was rejected by this court. With leave of court his petition of appeal was also filed by the advocates.

We have perused the grounds of appeal in the petitions filed by the accused personally. We find that the grounds of appeal contained therein are substantially the same as those contained in the supplementary petitions filed by the advocates. Mr *Nouwojee* who argued the appeal on behalf of all the appellants said that they would refer principally to the supplementary petitions but where necessary would refer to the petitions filed in person.

Mr *Nouwojee* argued the appeals broadly on the following grounds:

- (1) That the Chief Magistrate's actions had left the appellants unrepresented and deprived them of the benefit of the services of their advocates.
- (2) That the accused are jointly charged under count one with converting to their own use a motor vehicle but that the offence of conversion was not disclosed on the evidence nor were the appellants identified as joint perpetrators in the act of conversion.
- (3) That the opening address by the Attorney General contained irrelevant and prejudicial matters.
- (4) That the sentence was manifestly excessive. The prosecutor had expressed his views instead of confining himself to facts relevant to sentence.

- (5) That in the event of the convictions being quashed a re-trial would not be fair and should not be ordered.

We start with Mr *Nowrojee*'s critical analysis of the evidence and his argument that neither conversion nor identity was proved. Starting with the issue relating to conversion we quote below the relevant portions of section 294 of Penal Code:

"Any person who unlawfully and without colour of right, but not so as to be guilty of stealing, takes or converts to his own use or to the use of any other person any vehicle is guilty of a misdemeanour."

We have emphasized the portion which was the subject of exhaustive interpretation by the advocates. Mr *Nowrojee*'s interpretation was that there were far offences created in the section namely where the accused:

- (1) Takes to his own use or to the use of any other person – Two offences or
- (2) Converts to his own use or to the use of any other person – Two offences.

The particulars of the offence in count I alleged that the accused

"Jointly converted to your own use"

Mr *Nowrojee* contended that conversion implied or presupposed a lawful taking or possession in the initial stage and that the offence is committed only when the vehicle is subsequently put to an unauthorized use. On the other hand taking meant "an unlawful taking" at the initial stage.

We do not accept that interpretation. Our view is that the word "takes" alone constitutes one offence like a person who takes a vehicle unlawfully but does not put it to any use. The other offences covered by the words:

"Converts to his own use or to the use of any other person."

So in fact there are three and not four offences created in this section. If the legislature intended the user of the vehicle as a part of the word "takes" then the word "for" would have followed it. The word "to" goes with "converts" and not with "takes" because the phrase "takes to" has a different meaning which will not apply here.

Mr *Chunga* cited the Kenya case of *Republic v Burns* [1958] EA 142. We have studied this High Court decision of Sir Ronald Sinclair CJ and Templeton J and agree that conversion consists of dealing with property in a manner that is inconsistent with the right of the owner. We do not agree with Mr *Nowrojee*'s submission the in *Burns*' case the vehicle was already in lawful possession of the accused who was a police officer at that police station. That government vehicle was on charge to his police station.

In our view an offence of taking under this section started with the taking which is unlawful and without colour of right. If the person so taking the vehicle does not use it then the particulars of the charge will merely state:

“The accused unlawfully and without colour or right but not so as to be guilty of stealing took a motor vehicle.”

Otherwise how could an offence committed by merely taking unlawfully a vehicle without using it be differentiated under this section?

On the other hand, if subsequent to a lawful taking the taker uses the vehicle the particulars of the charge would use the word “converted” in the manner as stated in count 1. In view of the prosecution evidence that was produced, we are satisfied that the appellants were charged in the proper form and that there is no error or defect in the particulars.

Coming now to the question of identification of the appellants, Mr *Nourojee* said that no evidence had been produced to prove that the appellants in fact were the persons who drove the Land Rover from the University premises. He said the evidence was that the vehicle after being so driven away had stopped at the Great Court. The driver and the riders could have changed there or at Kabete or at Kenyatta University College which appeared to be the destination of the persons who had driven it away. We accept the possibilities put forward by Mr *Nourojee*.

The prosecution evidence was that PW2 had seen and heard some students (Students in this judgment mean students of the Nairobi University) asking for the bus driver. Clearly the students wanted to be driven in one of the University Vehicles. The evidence of the transport officer (PW3) was that after his refusal the group of students who had come to him for a bus had quietly gone out to the bus which they failed to start. More students came and the group grew bigger. The students came and the group grew bigger. The students managed to start the Land Rover and the group entered it and drove off in it. According to the evidence of these two witnesses and that of the security officer (PW10), this incident took place between 10:00am and 10:30am. At about 1:30pm the appellants, all university students, were found in that Land Rover at a road block on the highway between Kenyatta University College.

Mr *Chunga* very properly drew attention to the doctrine of recent possession which he submitted could be applied in deciding any offence that was related to or connected with the object found in such recent possession. A group of unidentified students had driven away in the Land Rover between 10:00am and 10:30am with the intention of going to Kabete and Kenyatta University College. The Land Rover was also seen at the Great Court. About three hours later the same Land Rover was seen driven out of the Kenyatta

University College. To our minds the prosecution evidence that we have summarized above was sufficient to require the appellants to be put on their defence. In fact, in our view the presumption arising out of the doctrine of recent possession in this case is very strong that the group of students who had boarded and driven the Land Rover from the University earlier in the day. We are not at this stage considering the defences made in the charge and caution statements and put forward during cross-examination of the prosecution witnesses. But we only confine ourselves to the finding that there was strong circumstantial evidence pointing to the appellants as the group which took away the Land Rover.

We now come to the submission that the opening address by the Attorney-General was contrary to the law, highly prejudicial and contained extraneous and irrelevant matter calculated to inflame and prejudice of the mind of the court against the appellants. It is also a ground of appeal that the prosecutor exceeded his function in telling the court in the opening address and at different times throughout the trial of his views of the alleged conduct of the appellant. We must state at the outset that we are satisfied that the term “complainant” in section 208(1) of Criminal Procedure Code includes the prosecutor as well as the person so described in the particulars of the charge. It is clear from section 26(3)(a) and (b) of the Constitution that the state through the Attorney-General is or can become the complainant in every criminal proceeding.

Mr *Nourojee* drew the court’s attention to various passages in the opening address of the Attorney-General which he claimed were prejudicial and containing extraneous and irrelevant matters intended to inflame the court’s mind against the appellants. He sought an acquittal on these grounds and in support cited the cases of *Nathan House v Republic* [1922] 16 criminal appeal R 51, *Banks v Republic* [1917] 12 criminal appeal R75, *BE Clewer v Republic* [1953] 37 criminal appeal R 35 and *Kabeni v Republic* [1970] EA 503.

We have carefully considered these authorities and accept Mr *Nourojee*’s contention that the conduct of counsel, the words he utters in his address and also the conduct of the court such as undue interruption by the judge are proper grounds for acquittal on appeal.

Mr *Chunga*, Assistant Deputy Public Prosecutor, in reply claimed that whatever allegations the Attorney-General had made in his opening address had been proved. The prosecution was not precluded from giving the background of the case and the status of an accused in society in the opening address. Evidence had shown that apart from the appellants there were others also involved in the perpetration of the offence. The comparison of the appellants’ behaviour with that of donkeys kicking their master did not mean that the appellants were donkeys but that they were ungrateful. The Attorney-

General's references to the expulsion and denial of sponsorship of certain students leading to the boycott of classes at the University College were intended to give the court a background of incidents forming part of the *res gestae* resulting in unlawful taking away of the Land Rover belonging to the University by the students. The court was to be told why the appellants needed the vehicle.

Mr *Chunga* pointed out sections 5 to 16 of the Evidence Act (Chapter 80) to explain factors governing admissibility of evidence and relevancy of facts. He contended that the whole of the opening address was relevant and if there were any irrelevant parts they had not prejudiced the mind of the Chief Magistrate as could be seen from the judgment. After referring to *Nathan's and Bank's* cases and other cases cited by him and the proviso to section 382 of Criminal Procedure Code, Mr *Chunga* stressed the following points:

- (1) Advocates of the represented appellants had not objected to any part of the opening address at the time it was delivered.
- (2) A jury is more susceptible to influence by an opening address than a professional and experienced magistrate.
- (3) An opening address is never part of the evidence and the prosecution does not undertake to prove all allegations made therein.
- (4) Even if parts of the opening address were prejudicial or irrelevant and it is shown that the trial court was influenced by such parts, the first appeal court will not necessarily quash a conviction but will test whether despite the said irregularities there was sufficient evidence to convict.

We accept the merit in Mr *Chunga's* arguments. We do not propose to go through the opening address of the Attorney-General with a fine tooth-comb. Both counsel did that for our benefit and we are mindful of all the arguments they put forward. Mr *Chunga* is correct in stating that the opening address is never part of the evidence. It is important therefore that the Attorney-General's address should not be presented as though it were evidence. It is also the reason why extra care should be taken by the prosecutor to ensure that the address is confined strictly to matters relating to the charge and the particulars of the charge and the evidence the prosecution intended to call to prove only the said particulars. The Attorney-General likened the students' behaviour to that of donkeys. He described the students going for meals and teas and then returning to the Great Court to attend meetings instead of attending lectures. The said comparison and reference to meals were unnecessary and, in the particular circumstances at this case, unfortunate. An accusation of ungratefulness before an accused has been found guilty can only prejudice the mind of the court to the detriment of the accused before the hearing of the evidence.

The use of the words “utter defiance” following the sentence “they went against law and order” and the use of the words “incited” and “incite” had to our minds no relevance to the particulars of the charges in the four counts which the prosecutor had undertaken to prove against the appellants. The use of the words “defiance” and “incitement” constituting serious offences contrary to section 96 of the Penal Code in such minor offences with which the appellants had been charged were in our view meant for no purpose there than to influence the trial court to the detriment of the appellants even before the hearing of evidence – particularly when the appellants had not been charged with any of those serious offences contrary to section 96 of the Penal Code.

The repeated association of the appellants with “others” in the opening address was also improper. In none of the charges is it stated that the appellant or appellants concerned had committed the offence stated therein “with others not before the court”. We accept Mr *Chunga*’s point that no objection had been raised at the time to any part of the Attorney-General’s opening address. On that day, 26 February 1985, the record shows that Mr Wetangula, Mr Kiragu and Mr Khamati representing accused 13, 8 and 6 respectively were present. Neither Mr Kokonya then representing the 10 accused was present nor Mr Karanja representing the 8 accused was present, nor was any explanation offered then or later for their absence, nor surprisingly did it appear that any of the advocates present had been requested to hold briefs for either of the two absent advocates. Be that as it may, both the two absent advocates, through their own unexplained absence, were not in a position to hear or object to any part of the Attorney-General’s opening address. In view of the fact that the opening address turned out to be one of the main grounds of this appeal it surprises us that none of the advocates present took any objection at that time to the undesirable portions of the opening address.

We do not agree with Mr *Chunga* that because no reference to the objectionable matters in the opening address had been made by the Chief Magistrate in his judgment that he was not influenced by them. Influence is not necessarily manifested in the judgment. Nor is that the only test. We are of the view that parts of the Attorney-General’s address were irrelevant and calculated to prejudice and influence the trial court to the detriment of the appellants. We are mindful of all the authorities cited and arguments put forward admirably by both the learned counsel. In view of the above observations we ask ourselves whether any material or significant injustice resulted from the opening addresses. On the strength of the prosecution evidence we are unable to so find.

As to the ground so vehemently argued by both counsel that the Chief Magistrate’s actions had left the appellants unrepresented and deprived them of

the benefit of the services of their advocates, we observe that on 22 February 1985 The hearing was fixed for three days commencing 26 February 1985 the fifth prosecution witness was still under cross-examination. Before the court was adjourned to a new hearing date the Chief Magistrate had to deal with applications for bail. Ruling on applications for bail was given the following day that is on 1 March 1985. As the hearing had not been fixed for 1 March 1985, the same had to be adjourned to a new hearing date. The prosecution suggested 4 March 1985. The dates did not suit defence counsel, Mr Kiragu and Mr Wetangula. Eventually by consent of all the parties the trial was adjourned and the hearing fixed for 27, 28 and 29 March 1985. "And if necessary in April 1985". As this adjournment and fixing of the new hearing dates were done in compliance with section 205(1) of the Criminal Procedure Code, we quote below the relevant portions of the sub-section:

"The court may, before or during the hearing of a case, adjourn the hearing to a certain time and place to be then appointed and stated in the presence and hearing of the party or parties or their respective advocates then present."

The marginal note is "adjournment" In *Jowitt's Dictionary of English Law* (2 ed) by John Burke "adjournment" is described as:

"A putting off to another time or place, a constitution of a meeting from one day to another"

The meaning of the word "adjourn" in *Shorter Oxford Dictionary* is given as to defer or put off proceedings to another day; to suspend proceedings and dispend for a time or sine die; to cite, or summon for, or remand to, a stated day.

It is clear that what adjournment means is putting off to a future date or day only. On 1 March 1985, the Chief Magistrate had lawfully adjourned the hearing to a future date which was 27 March 1985 onwards in the presence of all advocates who represented some of the appellants. The provisions of section 205(1) of Criminal Procedure Code were complied with.

The next thing that happened was that three days later on 4 March 1985, Assistant Deputy Public Prosecutor, Mr *Chunga* for prosecutor, Mr Kiragu for accused number 8, Mr Wetangula for accused 5, 12 and 13 were present before the Chief Magistrate. It is also noted that all the accused were absent. Mr Kokonya, though informed, was absent, and so was Mr Khamati. As it is not noted that he had been informed we can only presume that Mr Khamati for accused 6 had not been informed. In the absence of all the unrepresented appellants and in the absence of Mr Khamati for accused 6 the court made the following order:

“The hearing in this case will commence at 9:00am from 5 March 1985 and both counsels advised accordingly. The other advocates to be so informed also.

Accused to be produced.”

There are serious flaws in the above proceedings of 4 March 1985. It has to be noted that the words used in section 205(1) of the Penal Code are:

“The Court may before or during the hearing of a case adjourn the hearing.”

So the only acts that a subordinate court is permitted under the Criminal Procedure Code to do in connection with the adjournment and thereafter fixing of a hearing date are those as stated in the sub-section. If during the fixing of the hearing date the court acts in a manner not prescribed in the sub-section then it is acting beyond what it is permitted to do thereunder. It will thereby be acting unlawfully.

Coming back to the proceedings of 4 March 1985, the new hearing date that was fixed for 5 March 1985 whereby the trial was brought forward by a little over three weeks, was not an adjournment to a future date within the definition of that term stated above. Further, the new hearing date was fixed in the absence of eight unrepresented appellants and in the absence of one advocate (Mr Khamati) for one of the appellants. The fixing of the hearing date on 4 March 1985 was in contravention of section 205(1) of the Criminal Procedure Code and was unlawful. It must, however, be stressed that under the sub-section the discretion as to fixing of the hearing date is the magistrate's only. Convenience of an advocate or a party is not a consideration mentioned. Subject to relevant consideration such as expeditious disposal of cases, this discretion as a rule takes into consideration the convenience of the accused person and/or his advocate.

Mr *Chunga*, Assistant Deputy Public Prosecutor, for the respondent strongly argued that the hearing date was brought forward because of the concern felt by the Chief Magistrate for the appellants over the length of period they were spending in remand and that the advocates had not objected on 4 March 1985 to the change in the hearing date. We must point out here that prior to proceedings on 4 March 1985 the chief magistrate's conduct of the case had been in our view above reproach. He had not only displayed concern over the period being spent in remand by the appellants but had also been considerate to the advocates and had fixed hearing dates which did not inconvenience them. In fact, on 26 February 1985 after the Attorney-General's opening address when the court was getting ready to receive evidence from prosecution witnesses three advocates (for accused 6, 8 and 13) applied for adjournment because up to that date they said they had been refused access to the appellants and so had not been able to get proper instructions. It would have been difficult not to support the Chief Magistrate

if he had at that time refused adjournment because as he very rightly remarked the advocates had been appearing on behalf of their clients from a much earlier date. Yet they had never brought this complaint to his notice on any of the earlier occasions. Mr *Chunga* also pointed out that the office of the Attorney-General had not received any such complaint from any of the advocates concerned. In our view such inattention in the preparation of defence in a criminal trial does not reflect any credit on the part of the advocates concerned. However, the Chief Magistrate was considerate to the advocates and allowed adjournment till the afternoon session to enable them to obtain instructions.

But we do not find any substance in the reasons mentioned by Mr *Chunga* to justify the advancement of the hearing date. The Chief Magistrate must have had in mind the concern over the appellants remand period on 1 March 1985 when he fixed the hearing date in compliance with section 205(1) of the Criminal Procedure Code from 27 March 1985 and onwards. No extra factor is recorded in the proceedings of 4 March 1985 that could have resulted in such an increased concern over the appellants' remand period. As to the failure on the part of the two advocates present to object to the bringing forward of the date it is clear from the record that the advocates were not asked of their views on the new date.

In fact, what appears to have happened was that the Chief Magistrate merely presented them with his pre-conceived order of the court and which Mr *Nouwojee* very aptly described was a "*fait accompli*." Further the Chief Magistrate was well aware, having been so informed on 1 March 1985 that the week following did not suit the advocates because of prior commitments and that was why the hearing had been adjourned to 27 March 1985.

The upshot of this unlawful as well as arbitrary order of the court of 4 March 1985 was the withdrawal of all the four advocates who were by then representing six of the appellants. All the appellants on 5 March 1985 and again on 6 March 1985 applied for adjournment till 27 March 1985 to engage advocates. Adjournment was granted up to 6 March 1985. The appellants made it clear to the court that they were not participating in the trial. Except for second and third accused none of the other appellants said anything in his defence. However, in the peculiar circumstances of this case, we do not propose to treat the cases of the second and third accused as different from the rest of the appellants.

Mr *Chunga* spent a great deal of time in analyzing the cross-examination of prosecution witnesses up to 28 February 1985, the charge and caution statements of the appellants, and the judgment of the Chief Magistrate to show the line of the proposed defence of each appellant and how the Chief Magistrate had taken into consideration the defence that each appellant had in

mind and that, therefore, no prejudice had been caused. We can only say that no amount of such remedial steps can substitute a proper defence made by an accused who is fully participating in a trial with the knowledge that were cited on this issue a principle of major importance that was stressed is that justice must not only be done but must be seen to be done; it must be seen to be done not only by the public at large but also by the accused. That did not happen in this case.

We are mindful of Mr *Chunga's* cogent submission that the appellants had not acted in good faith when they had on 5 March and 6 sought adjournment up to 27 March 1985 to seek legal representation. We find it surprising that up to 1 March 1985 none of the eight unrepresented appellants had expressed any desire for or had sought an adjournment to engage an advocate. Suddenly 4 or 5 days later when the hearing was expected to recommence the unrepresented appellants felt that they now needed legal representation. Of course an accused has a right to engage the services of an advocate at any state of proceedings but all of them feeling that need on a particular day naturally arouses suspicion. Further on 6 March 1985, almost all of the appellants wanted an adjournment up to 27 March 1985 which was the date to which the hearing had been originally adjourned to suit the conveniences of the advocates. The behaviour of the appellants seems to lend support to Mr *Chunga's* accusation of bad faith. But in fairness the appellants' actions have to be viewed in light of the events that had taken place earlier.

The arbitrary and unlawful proceedings and order of the court of 4 March 1985 was the direct cause for the withdrawal of advocates. It cannot also be denied that the presence of the advocate provided the unrepresented appellants a shield which was lost by the withdrawal of the advocates. We are satisfied that section 77(d) of the Constitution was breached. Being mindful of all the relevant factors and circumstances, we find that on this ground we are unable to support any of the conviction in respect of any of the four counts. The appellants are entitled to an acquittal on all counts on this ground.

That brings us to the question of whether or not to order a retrial before another magistrate under section 354(3) of the Criminal Procedure Code. We shall also consider the question of sentence with this issue.

We have considered the evidence for the prosecution carefully. *Prima-facie* it is strong evidence. We are also mindful of the fact that the appellants had not put forward proper defences as provided by law. We are also keeping in mind the authorities cited on this issue on behalf of both sides. We are satisfied that this would be a proper case to be remitted for retrial by another court of competent jurisdiction. That brings us to the question of sentence imposed by the Chief Magistrate. On court I on which all the fourteen appellants were jointly charged, the appellants, all young people and first

offenders with the probability of having acted under a mob influence, were each given the maximum prison sentence which was a term of 6 months' imprisonment. The Chief Magistrate had remarked on the fact that the appellants had been in custody for one month but that does not appear to have affected the Chief Magistrate in his decision as regards the sentence. We understand that the appellants have served their sentences in respect of counts 1 and 3 and that some of them have been released. We are of the view that it will be unfair and justice will not be seen to be done if we now order a retrial.

The upshot is that the conviction of each appellant on every count on which he was convicted is now quashed, the sentences in respect of such convictions are set aside and any appellant still serving sentence is ordered to be released forthwith unless otherwise lawfully held.

For the appellants:

Mr Nowrojee

For the respondent:

Mr Chunga

VO V FRANCE

NO. 53924 OF 2000; [2004] 2 FCR 577

[1] *Human rights – Life – Deprivation – Foetus – Medical treatment necessitating abortion of foetus - Applicant initiating criminal proceedings for unintentional homicide – Criminal courts dismissing action – When right to life beginning – Whether applicant afforded effective remedy - European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, article 2.*

Editors Summary

The applicant, who was six months pregnant, attended a hospital for an examination. On the same day, another woman, who had a similar name, attended the hospital in order to have a coil removed. The doctor confused the two patients, and in an attempt to remove the coil from the applicant, he pierced the amniotic sac and a quantity of amniotic fluid was lost. As a result, the pregnancy was terminated on health grounds. It was common ground that the applicant had intended to carry the pregnancy to full term and that the foetus had been in good health. The applicant and her partner lodged a criminal complaint in which they alleged, *inter alia*, unintentional homicide of the applicant's child. The court acquitted the doctor of that offence on the basis that the foetus was not a human person for the purposes of the offence. That decision was reversed on appeal but subsequently upheld by the Court of Cassation. The applicant applied to the European Court of Human Rights complaining, *inter alia*, of the authorities' refusal to classify the taking of her unborn child's life as unintentional homicide, and that the absence of criminal legislation to prevent and punish such an act breached article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, which provided that 'Everyone's right to life shall be protected by law'. The French government contended, *inter alia*, that article 2 did not protect a foetus' right to life as a person, and the word 'everyone' in article 2 applied only postnatal. Furthermore, it was argued that the applicant had failed to exhaust an available domestic remedy, namely an action for compensation in the administrative courts. A number of third parties also made submissions. The matter was referred to the Grand Chamber.

Held: The issue of when the right to life began fell within the margin of appreciation enjoyed by contracting states since: (i) the issue of such protection had not been resolved within many contracting states; and (ii) there was no European consensus on the scientific and legal definition of the beginning of life. In those circumstances, it was neither desirable nor possible to answer in the abstract the question of whether an unborn child was a person

for the purposes of article 2. In any event, where the infringement of the right to life was not caused intentionally, the positive obligation imposed by article 2 to set up an effective judicial remedy did not necessarily require the provision of a criminal law remedy in every situation. In the instant case, the applicant could have made a claim for redress in the administrative courts which would have had fair prospects of success. Such an action could be regarded as an effective remedy. It followed that, even assuming that article 2 was applicable in the instant case, there had been no violation of that article.

Cases referred to in Judgment

(“A” means adopted; “AL” means allowed; “AP” means applied; “APP” means approved; “C” means considered; “D” means distinguished; “DA” means disapproved; “DT” means doubted; “E” means explained; “F” means followed; “O” means overruled)

United Kingdom

AG Reference (number 3 of 1994) [1997] 3 All ER 936, [1998] AC 245, [1997] 3 WLR 421, HL
Allemeine Gold-und Silberscheideanstalt AG v UK [1983] 32 DR 159, E Com HR
Burton v Islington Health Authority, De Martell v Merton and Sutton Health Authority [1992] 2 FCR 845, [1992] 3 All ER 833, [1993] QB 204, [1992] 3 WLR 637, CA
LCB v UK [1998] 4 BHRC 447, ECT HR
McCann v UK [1995] 21 EHRR 97, [1995] ECHR 18984/91, ECT HR
Paton v Trustees of BPAS [1978] 2 All ER 987, [1979] QB 276, [1978] 3 WLR 687
Powell v UK application number 45305/99 (ECT HR)
Pretty v UK [2002] 2 FCR 97, ECT HR
Reeve v UK [1994] 79A DR 146, E Com HR
Stubbings v UK [1997] 3 FCR 157, ECT HR
Tyrer v UK [1978] 2 EHRR 1, [1978] ECHR 5856/72, ECT HR
X v UK [1980] 19 DR 244, E Com HR

United States

Roe v Wade [1973] 410 US 113, US SC
Stenberg v Carhart [2000] 530 US 914, US SC
Baby Boy Case 2141

Others

Airey v Ireland [1979] 2 EHRR 305, [1979] ECHR 6289/73, ECT HR
Anagnostopoulos v Greece application number 54589/00 (3 April 2003, UR), ECT HR
Boso v Italy application number 50490/99 ECT HR
Brualla Gómez de la Torre v Spain [1999] ECHR 26737/95, ECT HR
Briggemann and Scheuten v Germany [1977] 10 DR 100, E Com HR
Calvelli v Italy [2002] ECHR 32967/96, ECT HR

- Christian Lawyers Association of South Africa and others v Minister of Health* [1998] (11) BCLR 1434, SA HC
- Deweert v Belgium* [1980] 2 EHRR 439, [1980] ECHR 6903/75, ECT HR
- Günaydin v Turkey* application number 27526/95 ECT HR
- H v Norway* [1992] 73 DR 155, E Com HR
- Kiliç v Turkey*, [2000] ECHR 22492/93, ECT HR
- Kress v France* [2001] ECHR 39594/98, ECT HR
- Lazzarini v Italy* application number 53749/00 ECT HR
- Loizidou v Turkey* [1995] 20 EHRR 99, ECT HR
- Mahmut Kaya v Turkey* [2000] ECHR 22535/93, ECT HR
- Mastromatteo v Italy* [2002] ECHR 37703/97, ECT HR
- Mazurek v France* [2000] ECHR 34406/97, ECT HR
- Ocalan v Turkey* [2003] ECHR 46221/99, ECT HR
- Odièvre v France* [2003] 1 FCR 621, ECT HR
- Open Door Counselling and Dublin Well Woman Centre v Ireland* [1992] 18 BMLR 1, ECT HR
- Perez v France* [2004] ECHR 47287/99, ECT HR
- R (on the application of Smeaton) v Secretary of State for Health* [2002] EWHC 610 (Admin), [2002] 2 FCR 193, [2002] 2 FLR 146
- Streletz, Kessler and Krenz v Germany* [2001] ECHR 34044/96, ECT HR
- Winnipeg Child Family Services v G* [1997] 152 DLR 193, Can SC
- Wójcik v Poland* [1997] 90A DR 24, E Com HR
- X v Austria* [1976] 7 DR 87, E Com HR
- X v Norway* application number 867/60 E Com HR
- Yasa v Turkey* [1998] ECHR 22495/93, ECT HR

Application

REES, MULARONI AND STRÁZNICKÁ: The applicant, Mrs Thi-Nho Vo, alleged a violation of article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 on the ground that the conduct of a doctor who was responsible for the death of her child in utero was not classified as unintentional homicide. The facts are set out in the judgment.

1. PROCEDURE

The case originated in an application (number 53924/00) against the French Republic lodged with the court under article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 [1953]; Cmd 8969) (the Convention) by a French national, Mrs Thi-Nho Vo (the applicant), on 20 December 1999.

The applicant was represented by Mr Le Griel, of the Paris Bar. The French government (the government) were represented by their agent, Mr Ronny Abraham, director of legal affairs at the Ministry of Foreign Affairs.

The applicant alleged, in particular, a violation of article 2 of the Convention on the ground that the conduct of a doctor who was responsible for the death of her child in utero was not classified as unintentional homicide.

The application was allocated to the third section of the court (rule 52(1) of the Rules of Court). Within that section, the chamber to which the case had been assigned decided on 22 May 2003 to relinquish jurisdiction in favour of the Grand Chamber with immediate effect, none of the parties having objected to relinquishment (article 30 of the Convention and rule 72).

The composition of the Grand Chamber was determined according to the provisions of article 27(2) and (3) of the Convention and rule 24 of the Rules of Court.

The applicant and the government each filed written observations on the admissibility and merits of the case. In addition, observations were also received from the Center for Reproductive Rights and the Family Planning Association, which had been given leave by the President to intervene in the written procedure (article 36(2) of the Convention and rule 44(2)).

A hearing on the admissibility and merits of the case took place in public in the Human Rights Building, Strasbourg, on 10 December 2003 (rule 59(3)).

There appeared before the court:

For the government Mr F *Alabrune*, deputy director of legal affairs, Ministry of Foreign Affairs, *agent*, Mr G Dutertre, draftsman, Human Rights Section, Directorate of Legal Affairs, Ministry of Foreign Affairs, Mrs J Vailhe, draftswoman, European and International Affairs Service, Ministry of Justice, Mr P Prache, Department of Criminal Affairs and Pardons, Ministry of Justice, Mr H Blondet, judge of the Court of Cassation, Mrs V Sagant, European and International Affairs Service, Ministry of Justice, counsel:

For the applicant Mr B Le *Griel*, of the Paris Bar, counsel.

The court heard addresses by Mr Le *Griel* and Mr *Alabrune*.

In accordance with the provisions of article 29(3) of the Convention and rule 54A(3), the court decided to examine the issue of admissibility of the application with the merits.

2 THE FACTS

The circumstances of the case

The applicant was born in 1967 and lives in Bourg-en-Bresse.

On 27 November 1991 the applicant, Mrs Thi-Nho Vo, who is of Vietnamese origin, attended the Lyons General Hospital for a medical examination scheduled during the sixth month of pregnancy.

On the same day another woman, Mrs Thi Thanh Van Vo, was due to have a coil removed at the same hospital. When the doctor who was to remove the coil called out the name 'Mrs Vo' in the waiting room, it was the applicant who answered.

After a brief interview, the doctor noted that the applicant had difficulty in understanding French. Having consulted the medical file he sought to remove the coil without examining her beforehand. In so doing, he pierced the amniotic sac causing the loss of a substantial amount of amniotic fluid.

After finding on clinical examination that the uterus was enlarged, the doctor ordered a scan. He then discovered that one had just been performed and realised that there had been a mistake of identity. The applicant was immediately admitted to hospital.

Dr G then attempted to remove the coil from Mrs Thi Thanh Van Vo, but was unsuccessful and so prescribed an operation under general anaesthetic for the following morning. A further error was then made when the applicant was taken to the operating theatre instead of Mrs Thi Thanh Van Vo, and only escaped the surgery intended for her namesake after she protested and was recognised by an anaesthetist.

The applicant left the hospital on 29 November 1991. She returned on 4 December 1991 for further tests. The doctors found that the amniotic fluid had not been replaced and that the pregnancy could not continue further. The pregnancy was terminated on health grounds on 5 December 1991.

On 11 December 1991 the applicant and her partner lodged a criminal complaint and applied to be joined as civil parties to the proceedings in which they alleged unintentional injury to the applicant entailing total unfitness for work for a period not exceeding three months and unintentional homicide of her child. Three expert reports were subsequently lodged.

The first, which was lodged on 16 January 1992, concluded that the foetus, a baby girl, was between 20 and 21 weeks old, weighed 375 grams, was 28 centimetres long, had a cranial perimeter of 17 centimetres and had not breathed after delivery. The expert also concluded that there was no indication that the foetus had been subjected to violence or was malformed and no evidence that the death was attributable to a morphological cause or to damage to an organ. Further, the autopsy performed after the abortion and an anatomico-pathological examination of the body indicated that the foetal lung was 20 to 24 weeks old.

On 3 August 1992 a second report was lodged concerning the applicant's injuries:

There is a period of temporary total unfitness for work from 27 November 1991 to 13 December 1991, when the patient was admitted to the Tonkin Clinic with an entirely unconnected pathology (appendectomy).

The date of stabilisation can be put at 13 December 1991

There is no loss of amenity

There is no aesthetic damage

There is no occupational damage

There is no partial permanent unfitness for work

Damages for the pain and suffering resulting from this incident still have to be assessed. The assessment should be carried out with a doctor of Vietnamese extraction specialising in psychiatry or psychology.'

The third report, which was issued on 29 September 1992, referred to the malfunctioning of the hospital department concerned and to negligence on the part of the doctor:

"The manner in which appointments in the departments run by Professors T and R at Lyons General Hospital are organised is not beyond reproach, in particular in that namesakes are common among patients of foreign origin and create a risk of confusion, a risk that is undoubtedly increased by the patients' unfamiliarity with or limited understanding of our language.

The fact that patients were not given precise directions and the consulting rooms and names of the doctors holding surgeries in them were not marked sufficiently clearly increased the likelihood of confusion between patients with similar surnames and explains why, after Dr G had acquainted himself with Mrs Thi Than Van Vo's medical file, it was [the applicant] who came forward in response to his call.

The doctor acted negligently, by omission, and relied solely on the paraclinical examinations. He did not examine his patient and by an unfortunate error ruptured the amniotic sac causing the pregnancy to terminate at five months. He is accountable for that error, although there are mitigating circumstances."

On 25 January 1993, following supplemental submissions by the prosecution on 26 April 1994, Dr G was charged with causing unintentional injury at Lyons on 27 November 1991 by:

"through his inadvertence, negligent act or inattention, perforating the amniotic sac in which the applicant's live and viable foetus was developing, thereby unintentionally causing the child's death (a criminal offence under article 319 of the

former Criminal Code—which was applicable at the material time—now article 221-6 of the Criminal Code);

through his inadvertence, negligent act, inattention, negligent omission or breach of a statutory or regulatory duty of protection or care, causing the applicant bodily injury that resulted in her total unfitness for work for a period not exceeding three months (a criminal offence under article R40, sub-paragraph 4, of the former Criminal Code—which was applicable at the material time—now article rule 625-2 and rule 625-4 of the Criminal Code).”

By an order of 31 August 1995, Dr G was committed to stand trial in Lyons Criminal Court on counts of unintentional homicide and unintentionally causing injuries.

By a judgment of 3 June 1996 the Criminal Court found that the accused was entitled as of right to an amnesty under the Amnesty Law of 3 August 1995 in respect of the offence of unintentionally causing injuries entailing temporary unfitness for work of less than three months. As to the offence of unintentional homicide of the foetus, it held:

“The issue before the court is whether the offence of unintentional homicide or the unintentional taking of the foetus's life is made out when the life concerned is that of a foetus, if a 20 to 21 week old foetus is a human person (“another” within the meaning of article 221-6 of the Criminal Code).

The expert evidence must be accepted. The foetus was between 20 and 21 weeks old.

At what stage of maturity can an embryo be considered a human person?

The Law of 17 January 1975 on the Voluntary Termination of Pregnancy provides: “The law guarantees respect of every human being from the beginning of life.

The Law of 29 July 1994 (article 16 of the Civil Code) provides: “The law secures the primacy of the person, prohibits any assault on human dignity and guarantees the respect of every human being from the beginning of its life”.

The laws of 29 July 1994 expressly employed the terms “embryo” and “human embryo” for the first time. However, the term “human embryo” is not defined in any of them.

When doing the preparatory work for the legislation on bioethics, a number of parliamentarians (both members of the National Assembly and senators) sought to define “embryo”. Charles de Courson proposed the following definition: “Every human being shall be respected from the start of life; the human embryo is a human being.” Jean-François Mattéi stated: “The embryo is in any event merely the morphological expression of one and the same life that begins with impregnation

and continues till death after passing through various stages. It is not yet known with precision when the zygote becomes an embryo and the embryo a foetus, the only indisputable fact being that the life process starts with impregnation."

It thus appears that there is no legal rule to determine the position of the foetus in law either when it is formed or during its development. In view of this lack of a legal definition it is necessary to return to the known scientific facts. It has been established that a foetus is viable at six months and on no account, on present knowledge, at 20 or 21 weeks.

The court must have regard to that fact (viability at six months) and cannot create law on an issue which the legislators have not yet succeeded in defining.

The court thus notes that a foetus becomes viable at the age of six months; a 20 to 21 week-old foetus is not viable and is not a "human person" or "another" within the meaning of former article 319 and article 221-6 of the Criminal Code.

The offence of unintentional homicide or of unintentionally taking the life of a 20 to 21 week-old foetus has not been made out, since the foetus was not a "human person" or "another" °

Acquits Dr G of the charge without penalty or costs."

On 10 June 1996 the applicant appealed against that judgment. She argued that Dr G had been guilty of personal negligence severable from the functioning of the public service and sought the following amount: 1 million French francs (FRF) in damages, comprising FRF 900 000 for the death of the child and FRF 100 000 for the injury she had sustained. The public prosecutor's office, as second appellant, submitted that the acquittal should be overturned. It observed: 'By failing to carry out a clinical examination, the accused was guilty of negligence that caused the death of the foetus, which at the time of the offence was between 20 and 24 weeks old and following, normally and inexorably, the path of life on which it had embarked, there being no medical doubt over its future.

In a judgment of 13 March 1997, the Lyons Court of Appeal upheld the judgment in so far as it had declared the prosecution of the offence of unintentionally causing injuries statute-barred but overturned the remainder of the judgment and found the doctor guilty of unintentional homicide. It imposed a six-month suspended prison sentence and a fine of FRF 10 000, holding:

"In the instant case Dr G's negligence is characterised in particular by the fact that the patient's knowledge of French was insufficient to enable her to explain her condition to him, to answer his questions or to give him the date of her last period, circumstances that should have further impressed upon him the need for a thorough clinical examination. The assertion that he was entitled to rely on the

medical records alone shows that, though an able scientist, this young doctor was nonetheless unaware of one of the essential skills of the practice of medicine: listening to, getting to know and examining the patient. Indeed, before this court Dr G said that the accident had impressed upon him how vital it was to take precautions before operating.

There is a clear causal link between this negligent act and omission and the death of the child Mrs Vo was carrying. The accused has himself acknowledged, with commendable honesty, that a clinical examination would have alerted him to the fact that the patient was pregnant and had been mistaken for another patient.

As regards the classification of the offence as unintentional homicide, it is first necessary to reiterate the legal principles governing this sphere.

Various provisions of international treaties, such as article 2 of the European Convention on Human Rights and Fundamental Freedoms, article 6 of the International Covenant on Civil and Political Rights and article 6 of the Convention on the Rights of the Child signed in New York on 26 January 1990, recognise a right to life protected by law for everyone, and notably children.

Under domestic law, section 1 of the Voluntary Termination of Pregnancy Act of 17 January 1975 (Law no 75-17) specifies: "The law guarantees respect of every human being from the beginning of life this principle may only be derogated from in the event of necessity and in accordance with the conditions set out in this statute.

Further, Law no 94-653 of 29 July 1994 on the Respect of the Human Body lays down in article 16 of the Civil Code: "The law secures the primacy of the person, prohibits any assault on human dignity and guarantees the respect of every human being from the beginning of its life."

These statutory provisions cannot be regarded as mere statements of intent, devoid of any legal effect, since article 16-9 of the Civil Code indicates that the provisions of article 16 are mandatory.

For its part the Criminal Division of the Court of Cassation applied these rules of international and domestic law in two judgments it delivered on 27 November 1996, specifying that the Act of 17 January 1975 only permits derogation from the rule stated in section 1 thereof that every human being is entitled to respect from the beginning of life in cases of necessity and subject to the conditions and limitations set out in it.

The Court of Cassation added that having regard to the conditions laid down by the legislature, the provisions of that statute and of the laws of 31 December 1979 on the Voluntary Termination of Pregnancy, taken as a whole, were not incompatible with the aforementioned treaty provisions.

In a different case, moreover, the Court of Cassation pointed out that on signing the Convention on the Rights of the Child in New York on 26 January 1990, France made a declaration concerning interpretation in which it stated that the Convention could not be interpreted as constituting any obstacle to the implementation of the provisions of French legislation on the voluntary termination of pregnancy. That reservation shows, by converse implication, that that Convention could concern a foetus aged less than ten weeks, the statutory maximum foetal age in France for a voluntary termination of pregnancy.

It follows that, subject to the provisions on the voluntary termination of pregnancies and therapeutic abortions, the right to respect for every human being from the beginning of life is guaranteed by law, without any requirement that the child be born as a viable human being, provided it was alive when the injury occurred.

Indeed, viability is a scientifically indefinite and uncertain concept, as the accused, who is currently studying in the United States, himself acknowledged, informing the court that foetuses born between 23 and 24 weeks after conception could now be kept alive, a situation that was inconceivable a few years ago. In the opinion prepared by Professor Thouvenin and adduced in evidence by Dr G, reference is made to a report by Professor Mattéi in which it is indicated that the embryo is merely the morphological expression of one and the same life that begins with impregnation and continues till death after passing through various stages. It is not yet known with precision when the zygote becomes an embryo and the embryo a foetus, the only indisputable fact being that the life process starts with impregnation

Thus the issue of viability at birth, a notion that is uncertain scientifically, is in addition devoid of all legal effect, as the law makes no distinction on that basis.

In the instant case it has been established that when the scan was performed on 27 November 1991—before the amniotic fluid was lost later that day—the [applicant's] pregnancy had been proceeding normally and the child she was carrying was alive. When the therapeutic abortion was performed on 5 December 1991, it was noted that a comparison of the child's measurements with published tables suggested that the foetus was between 20 and 21 weeks old and possibly older, as it is not certain that the tables take into account the specific morphology of children of Vietnamese origin. Dr G when questioned on this point at the hearing, was unable to provide any further information. The conclusion from the anatomico-pathological examination was that the foetal lung indicated an age of between 20 and 24 weeks, its measurements suggesting that an age at the lower end of that range was the most likely. In any event, as Dr G said in evidence, the age of the foetus was very close to that of certain foetuses that have managed to survive in the United States. The photographs at page D 32 of the trial bundle show a perfectly formed child whose life was cut short by the accused's negligence.

As the Douai Court of Appeal observed in its judgment of 2 June 1987, had the assault on the child concerned inflicted a non-fatal wound, it would have been classified without any hesitation as an offence of unintentionally causing injuries. A fortiori, an assault leading to the child's death must be classified as unintentional homicide.

Thus, the strict application of the legal principles, established scientific fact and elementary common sense all dictate that a negligent act or omission causing the death of a 20 to 24 week-old foetus in perfect health should be classified as unintentional homicide.

Consequently, the impugned judgment must be overturned.

While the applicant's civil action is admissible, if only to corroborate the prosecution case, this court has no jurisdiction to hear the claim for reparation. This is because despite the serious nature of the negligent act and omission of Dr G a doctor in a public hospital, they do not constitute personal misconduct of such exceptional gravity entailing a total disregard for the most elementary principles and duties inherent in his function as to make them severable from public service.

None the less, it is appropriate to order Dr G to pay to this civil party compensation in the sum of 5 000 francs under article 475-1 of the Code of Criminal Procedure on account of costs which she has incurred, but which have not been paid by the state."

On 30 June 1999, on an appeal on points of law by the doctor, the Court of Cassation reversed the judgment of the Lyons Court of Appeal and ruled that there was no reason to remit the case for retrial:

"Having regard to article 111-4 of the Criminal Code."

Criminal law provisions must be strictly construed:

In convicting [the doctor] of unintentional homicide, the appellate court noted that article 2 of the European Convention on Human Rights and Fundamental Freedoms and article 6 of the International Covenant on Civil and Political Rights recognise the existence for all persons of a right to life protected by law. The appellate court stated that the Voluntary Termination of Pregnancy Act of 17 January 1975 establishes the rule that the life of every human being must be respected from the beginning of life. That rule is now restated in article 16 of the Civil Code as worded following the amendment made by the Law of 29 July 1994. The appellate court went on to state that by operating without performing a prior clinical examination, the doctor was guilty of a negligent act or omission that had a definite causal link with the death of the child the patient was carrying.

However, by so holding, when the matters of which the defendant was accused did not come within the definition of the offences set out in former article 319 and article 221-6 of the Criminal Code, the Court of Appeal misinterpreted the aforementioned provisions."

(3) RELEVANT DOMESTIC LAW AND PRACTICE

(a) Criminal Code

The provision dealing with the unintentional taking of life at the material time and until 1 March 1994 was article 319 of the Criminal Code, which read as follows. Article 319:

“Anyone who through his or her inadvertence, negligent act, inattention, negligent omission or breach of regulation unintentionally commits homicide or unintentionally causes death, shall be liable to imprisonment of between three months and two years and a fine of between 1 000 and 30 000 francs.”

Since 1 March 1994, the relevant provision has been article 221-6 of the Criminal Code (as amended by Law no 2000-647 of 10 July 2000 and Order no 2000-916 of 19 September 2000) which is to be found in section II ('Unintentional taking of life') of Ch I ('Offences against the human person') of Pt II ('Serious crimes and other offences against the person'). Article 221-6 provides:

“It shall be an offence of unintentional homicide punishable by three years' imprisonment and a fine of 45 000 euros to cause the death of another in the conditions and in accordance with the distinctions set out in article 121-3 by inadvertence, negligent act, inattention, negligent omission or breach of a statutory or regulatory duty to ensure safety or of care.

In the event of a manifestly deliberate breach of a special statutory or regulatory duty to ensure safety or of care, the maximum sentences shall be increased to five years' imprisonment and a fine of 75 000 euros.”

Article 223-10 of the Criminal Code, which concerns the voluntary termination of pregnancy by a third party without the mother's consent, is to be found in section V under the heading 'Unlawful termination of pregnancy' of Ch III, entitled 'Endangering the person' in Part II. It reads as follows: 'It shall be an offence punishable by five years' imprisonment and a fine of 500 000 francs to terminate a pregnancy without the mother's consent.

Section III entitled 'Protection of the embryo' of Ch I (Public-health offences) of Book V (Other serious crimes (crimes) and other major offences (délits) prohibits various types of conduct on grounds of medical ethics (article 511-15 to 511-25), including the conception of human embryos in vitro for research or experimental purposes (article 511-18).

4 THE PUBLIC-HEALTH CODE

At the material time the limitation period for an action in damages in the administrative courts was four years while the period in which a pregnancy could be voluntarily terminated lawfully was ten weeks following conception.

The provisions of the Public-Health Code as worded since the Patients' Rights and Quality of the Health-Service Act (Law number 2002-303) of 4 March 2002 came into force read as follows. Article L1142-1:

“Save when they incur liability as a result of a defect in a health product, the medical practitioners mentioned in the Fourth Part of this Code and all hospitals, clinics, departments and organisations in which preventive medicine, diagnosis or treatment is performed on individuals shall only be liable for damage caused by preventive medicine, diagnosis or treatment if they have been at fault.”

Article L1142-2:

“Private medical practitioners, the hospitals, clinics, health services and organisations mentioned in article L142-1 and any other legal entity other than the State that is engaged in preventive medicine, diagnosis or treatment and the producers and suppliers of and dealers in health products in the form of finished goods mentioned in article L5311-1 with the exception of subparagraph 5 thereof, subject to the provisions of article L1222-9 and subparagraphs 11, 14 and 15, that are used in connection with such activities shall be under a duty to take out insurance in respect of any third-party or public-authority liability they may incur for damage sustained by third parties as a result of an assault against the person in the course of that activity taken as a whole.”

Article L1142-28:

“The limitation period for actions against medical practitioners and public or private hospitals or clinics in respect of preventive medicine, diagnosis or treatment shall be ten years from the date the condition stabilises.”

Article L2211-1:

“As stated in article 16 of the Civil Code as hereafter reproduced: “The law secures the primacy of the person, prohibits any assault on human dignity and guarantees the respect of every human being from the beginning of its life.”

Article L2211-2:

“The principle referred to in article L2211-1 may only be derogated from in the event of necessity and in accordance with the conditions set out in this Part. It shall be the nation's duty to educate society on this principle and its consequences, [to provide] information on life's problems and on national and international demography, to inculcate a sense of responsibility, to receive children into society and to uphold family life. The State, aided by the local and regional authorities, shall perform these obligations and support initiatives that assist it to do so.”

Article L 2212-1:

“A pregnant woman whose condition causes her distress may ask a doctor to terminate her pregnancy. The pregnancy may only be terminated within the first twelve weeks.”

Article L 2213-1:

“A pregnancy may be voluntarily terminated at any time if two doctors from a pluridisciplinary team certify, after the team has issued a consultative opinion, that either the woman's continued pregnancy puts her health at serious risk or that it is highly likely that the unborn child is suffering from a particularly serious affection which is recognised as incurable at the time of diagnosis.”

(a) The position taken by the Court of Cassation

The Court of Cassation has followed its decision in the instant case (see paragraph 22 above) on two occasions (in its judgments of 29 June 2001, Full Court, *Bulletin* number 165, and of 25 June 2002, Criminal Division, *Bulletin* number 144), despite submissions from the advocates-general concerned to the contrary.

(b) Judgment of the full court of 29 June 2001

“As regards the two grounds of appeal of the Public Prosecutor at the Metz Court of Appeal and of Mrs X which have been joined together.

On 29 July 1995 a vehicle being driven by Mr Z collided with a vehicle being driven by Mrs X who was six months pregnant. She was injured and as a result of the impact lost the foetus she was carrying. In the impugned judgment (Metz Court of Appeal, 3 September 1998), Mr Z was convicted of unintentionally injuring Mrs X aggravated by the fact that he was under the influence of drink. However, he was acquitted of the unintentional killing of the unborn child.

The grounds of appeal against that decision are, firstly, that article 221-6 of the Criminal Code, which makes it an offence to cause the death of another, does not exclude from its scope a viable unborn child and that, by holding that this provision applied only to a child whose heart was beating at birth and who was breathing, the Court of Appeal had added a condition that was not contained in the statute, and, secondly, unintentionally causing the death of an unborn child constituted the offence of unintentional homicide if the unborn child was viable at the material time, irrespective of whether or not it breathed when it was separated from the mother, with the result that there had been a violation of articles 111-3, 111-4 and 221-6 of the Criminal Code and article 593 of the Code of Criminal Procedure.

The rule that offences and punishment must be defined by law, which requires that criminal statutes be construed strictly, pleads against extending the scope of article 221-6 of the Criminal Code, which makes unintentional homicide an offence, to cover unborn children whose status in law is governed by special provisions concerning embryos and foetuses.”

(c) Judgment of the Criminal Division of 25 June 2002

Having regard to former article 319, article 221-6 and article 111-4 of the Criminal Code.

The rule that offences and punishment must be defined by law, which requires that criminal statutes be construed strictly, pleads against a charge of unintentional homicide lying in the case of a child that is not born alive.

The impugned judgment established that Z, whose pregnancy under the supervision of X came to term on 10 November 1991, attended the clinic in order to give birth on 17 November. She was placed under observation at about 8:30pm and drew the attention of the midwife, Y, to an anomaly in the child's cardiac rhythm. Y refused to call the doctor. A further test carried out at 7:00am the following morning showed a like anomaly and subsequently that the heart had stopped beating altogether. At about 8:00am, X pronounced the baby dead. In the evening he proceeded to extract a stillborn child by caesarean section. According to the autopsy report, the child did not present any malformation but had suffered from anoxia.

In finding Y guilty of unintentional homicide and X who was acquitted by the criminal court, liable for the civil consequences of that offence, the Court of Appeal held that the child's death was a result of the negligent acts and omissions of both the doctor in failing to place the patient, who was beyond term, under closer observation and of the midwife in failing to notify an unequivocal anomaly noted when the child's cardiac rhythm was recorded.

After noting that the stillborn child did not present any organic lesion capable of explaining its death, the Court of Appeal stated: "This child had reached term several days previously and, but for the fault that has been found, would have been capable of independent survival, with a human existence separate from its mother's."

However, by so holding, the Court of Appeal misapplied the provisions referred to above and the aforementioned principles.

It follows that this appeal on points of law is allowed. The case will not be remitted, as the facts are not capable of coming within the definition of any criminal offence.

The Criminal Division of the Court of Cassation has held that a court of appeal gave valid reasons for finding a defendant guilty of the unintentional homicide of a child who died an hour after its birth on the day of a road-traffic accident in which its mother, who was eight months pregnant, was seriously injured, when it held that, by failing to control his vehicle, the driver had caused the child's death an hour after birth as a result of irreversible lesions

to vital organs sustained at the moment of impact (Court of Cassation, Criminal Division, 2 December 2003).

An article entitled 'Unintentional violence on pregnant women and the offence of unintentional homicide' (*Recueil Dalloz* 2004, page 449) notes that in 28 out of a total of 34 articles commenting on the Criminal Division of the Court of Cassation's judgment of 2 December 2003 (see paragraph 30 above) the authors are critical of the Court of Cassation's case law (see paragraph 29 above).

The criticism includes: the laconic reasoning of the Court of Cassation's judgments and incoherence of the protection afforded, as a person causing unintentional injury is liable to criminal prosecution while a person who unintentionally causes the death of the foetus goes unpunished; the fact that a child who has lived for a few minutes is recognised as having standing as a victim, whereas a child that dies in utero is ignored by the law; and the fact that freedom to procreate is less well protected than freedom to have an abortion.

(5) THE GARRAUD AMENDMENT

On 27 November 2003 the National Assembly adopted on its second reading a bill to adapt the criminal justice system to changes in criminality. The bill included the Garraud amendment, so named after the member of parliament who moved it, which created an offence of involuntary termination of pregnancy (ITP).

The adoption of this amendment gave rise to fierce controversy and, after a week of consultations, the Minister of Justice, Mr Perben, declared on 5 December 2003 that the member's proposal 'caused more problems than it solved' and that he was in favour of abandoning it. On 23 January 2004 the Senate unanimously deleted the amendment. This was the second time the senators had rejected such a proposal, as they had already opposed it in April 2003 when examining the Reinforcement of Protection against Road Violence Act, passed on 12 June 2003.

(6) THE LAWS ON BIOETHICS

On 11 December 2003 the National Assembly adopted on its second reading a bill on bioethics with a view to reforming the 1994 Laws on the Donation and Use of Parts and Products of the Human Body, Medically Assisted Procreation and Pre-Natal Diagnosis, as the legislature had envisaged at the time in order to take into account subsequent scientific and medical progress and new issues with which society was confronted. In view of the speed at which technical advances have been made, the bill reinforces the guarantees on the provision of information and on seeking and obtaining consents and prohibits

certain practices that are technically feasible (reproductive cloning), while providing a framework for those with a proven medical interest (research on embryos *in vitro*). It establishes a regulatory and supervisory body (The Procreation, Embryology and Human-Genetics Agency) whose functions also include acting as a watchdog and providing support and expert guidance in these spheres (<http://www.assemblée-at.fr/dossiers/bioethiques.asp>).

(7) EUROPEAN LAW

(a) The Oviedo Convention on Human Rights and Biomedicine

The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, also known as the Convention on Human Rights and Biomedicine, which was opened for signature on 4 April 1997 in Oviedo, entered into force on 1 December 1999. In this Convention, the member states of the Council of Europe, the other states and the European Community signatories to it agreed as follows:

'Resolving to take such measures as are necessary to safeguard human dignity and the fundamental rights and freedoms of the individual with regard to the application of biology and medicine,

Have agreed as follows:

Chapter I-General provisions

Article 1-Purpose and object

Parties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine.

Each Party shall take in its internal law the necessary measures to give effect to the provisions of this Convention.

Article 2-Primacy of the human being

The interests and welfare of the human being shall prevail over the sole interest of society or science.

Chapter V-Scientific research.

Article 18-Research on embryos *in vitro*

Where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo.

The creation of human embryos for research purposes is prohibited.

Chapter XI-Interpretation and follow-up of the Convention.

Article 29-Interpretation of the Convention

The European Court of Human Rights may give, without direct reference to any specific proceedings pending in a court, advisory opinions on legal questions concerning the interpretation of the present Convention at the request of the Government of a Party, after having informed the other Parties; the Committee set up by article 32, with membership restricted to the Representatives of the Parties to this Convention, by a decision adopted by a two-thirds majority of votes cast.”

The commentary on article 1 (see paragraph 16 to 19 of the Explanatory Report on the Convention) states:

'Article 1-Purpose and object

This article defines the Convention's scope and purpose.

The aim of the Convention is to guarantee everyone's rights and fundamental freedoms and, in particular, their integrity and to secure the dignity and identity of human beings in this sphere.

The Convention does not define the term "everyone" (in French "*toute personne*"). These two terms are equivalent and found in the English and French versions of the European Convention on Human Rights, which however does not define them. In the absence of a unanimous agreement on the definition of these terms among member States of the Council of Europe, it was decided to allow domestic law to define them for the purposes of the application of the present Convention.

The Convention also uses the expression "human being" to state the necessity to protect the dignity and identity of all human beings. It was acknowledged that it was a generally accepted principle that human dignity and the identity of the human being had to be respected as soon as life began.”

(b) Additional Protocol to the Convention on Human Rights and Biomedicine, on the Prohibition of Cloning Human Beings 12 January 1998

Article 1 of the Protocol provides:

“Article 1

Any intervention seeking to create a human being genetically identical to another human being, whether living or dead, is prohibited.

For the purpose of this article, the term human being "genetically identical" to another human being means a human being sharing with another the same nuclear gene set.”

(c) Draft additional Protocol to the Convention on Human Rights and Biomedicine, on biomedical research

This draft was approved by the Steering Committee on Bioethics on 20 June 2003. It was submitted for approval to the Committee of Ministers, which sought a consultative opinion from the Parliamentary Assembly. On 30 April 2004 the Assembly issued an opinion (number 252 (2004)) in which it declared itself in favour of the draft protocol and in consequence recommended that the Committee of Ministers open it for signature as soon as possible.

Article 1-Object and purpose:

“Parties to this Protocol shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to any research involving interventions on human beings in the field of biomedicine.”

Article 2-Scope:

“This Protocol covers the full range of research activities in the health field involving interventions on human beings.

This Protocol does not apply to research on embryos *in vitro*. It does apply to research on fetuses and embryos *in vivo*.”

Article 3 Primacy of the human being: 'The interests and welfare of the human being participating in research shall prevail over the sole interest of society or science.'

Article 18-Research during pregnancy or breastfeeding:

“Research on a pregnant woman which does not have the potential to produce results of direct benefit to her health, or to that of her embryo, foetus or child after birth, may only be undertaken if the following additional conditions are met:

The research has the aim of contributing to the ultimate attainment of results capable of conferring benefit to other women in relation to reproduction or to other embryos, fetuses or children.”⁹¹

The draft explanatory report repeats the terms of the explanatory report on the Convention.

(d) The Working Party on the Protection of the Human Embryo and Foetus: Protection of the human embryo *in vitro* 2003

The Working Party on the Protection of the Human Embryo and Foetus set up by the Steering Committee on Bioethics reached the following conclusion in a report drawn up in 2003:

“This report aimed at giving an overview of current positions found in Europe regarding the protection of the human embryo *in vitro* and the arguments supporting them.

It shows a broad consensus on the need for the protection of the embryo *in vitro*. However, the definition of the status of the embryo remains an area where fundamental differences are encountered, based on strong arguments. These differences largely form the basis of most divergences around the other issues related to the protection of the embryo *in vitro*.

Nevertheless, even if agreement cannot be reached on the status of the embryo, the possibility of re-examining certain issues in the light of the latest developments in the biomedical field and related potential therapeutic advances could be considered. In this context, while acknowledging and respecting the fundamental choices made by the different countries, it seems possible and desirable with regard to the need to protect the embryo *in vitro* on which all countries have agreed, that common approaches be identified to ensure proper conditions for the application of procedures involving the creation and use of embryos *in vitro*. The purpose of this report is to aid reflection towards that objective.”

(e) The European Group on Ethics in Science and New Technologies at the European Commission

The group has issued, *inter alia*, the following opinion on the Ethical aspects of research involving the use of human embryo in the context of the fifth framework programme 23 November 1998:

(8) LEGAL BACKGROUND

Controversies on the concept of beginning of life and "personhood"

Existing legislation in the Member States differs considerably from one another regarding the question of when life begins and about the definition of "personhood". As a result, no consensual definition, neither scientifically nor legally, of when life begins exists.

Two main views about the moral status of the embryo and thus regarding the legal protection afforded to them with respect to scientific research exist:

Human embryos are not considered as human beings and consequently have a relative worth of protection;

Human embryos have the same moral status as human beings and consequently are equally worthy of protection.

The discussion of common rules on embryo research is continuing. Recently many European countries, when discussing and signing the Council of Europe Convention on Human Rights and Biomedicine, failed to reach a consensus

concerning the definition of the embryo, and, therefore, were unable to find common ground on which to place the admissibility of human embryo research within the Convention. Hence, it is up to the Member States to legislate in this area. Yet, nevertheless, Article 18. 1 of the Convention stipulates "where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo."

Different approaches regarding the definition of the human embryo:

In most Member States there is presently no legal definition of the human embryo (Belgium, Denmark, Finland, France, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal and Sweden). Among those Member States which define the embryo in their legislation, the existing definitions vary considerably from one country to another (Austria, Germany, Spain and the United Kingdom).

Different scope of national legislation:

Among the Member States with legal provisions on embryo research, there are many differences regarding the activities allowed and prohibited.

There are countries where embryo research is allowed only for the benefit of the particular embryo (Austria, Germany). There are Member States where embryo research is exceptionally allowed (France, Sweden), or allowed under strict conditions (Denmark, Finland, Spain, United Kingdom).

Diversity of views:

The diversity of views regarding the question whether or not research on human embryos *in vitro* is morally acceptable, depends on differences in ethical approaches, philosophical theories and national traditions, which are deeply rooted in European culture. Two contrasting approaches exist: a deontological approach, in which duties and principles control the ends and consequences of our actions; and utilitarian or consequentialist approaches in which human actions are evaluated in terms of means and ends or consequences °

(9) THE GROUP SUBMITS THE FOLLOWING OPINION

In the preamble it appeared crucial to recall that the progress of knowledge of life sciences, which in itself has an ethical value, cannot, in any case, prevail over fundamental human rights and the respect which is due to all the members of the human family.

The human embryo, whatever the moral or legal status conferred upon it in the different European cultures and ethical approaches, deserves legal protection. Even if taking into account the continuity of human life, this protection ought to be reinforced as the embryo and the foetus develop.

The Treaty on European Union, which does not foresee legislative competence in the fields of research and medicine, implies that such protection falls within the competence of national legislation (as is the case for medically assisted procreation and voluntary interruption of pregnancy). However, Community authorities should be concerned with ethical questions resulting from medical practice or research dealing with early human development.

However, when doing so, the said Community authorities have to address these ethical questions taking into account the moral and philosophical differences, reflected by the extreme diversity of legal rules applicable to human embryo research, in the 15 Member States. It is not only legally difficult to seek harmonisation of national laws at Community level, but because of lack of consensus, it would be inappropriate to impose one exclusive moral code.

The respect for different philosophical, moral or legal approaches and for diverse national culture is essential to the building of Europe.

From an ethical point of view, the multicultural character of European society requires mutual tolerance to be shown by the citizens and political figures of the European Nation States that have chosen uniquely to tie their destiny together, while at the same time ensuring mutual respect for different historical traditions which are exceedingly strong.

From a legal point of view, this multiculturalism is based upon article 6 of the Amsterdam Treaty (ex article F of the Treaty on European Union) which recognises fundamental rights at Union level notably based on "constitutional traditions common to the Member States". It also declares that "the Union shall respect the national identity of its Member States".

It results from the aforementioned principles, that, in the scope of European research programmes, the question of research on the human embryo has to be approached, not only with regard to the respect for fundamental ethical principles, common to all Member States, but equally taking into consideration diverse philosophical and ethical conceptions, expressed through the practices and the national regulations in force in this field ⁹¹

(a) Comparative law

In the majority of the member states of the Council of Europe, the offence of unintentional homicide does not apply to the foetus. However, three countries have chosen to create specific offences. In Italy a person negligently causing a pregnancy to terminate is liable to a prison sentence of between three months and two years under section 17 of the Abortion Act of 22 May

1978. In Spain article 157 of the Criminal Code makes it a criminal offence to cause damage to the foetus and article 146 an offence to cause an abortion through gross negligence. In Turkey article 456 of the Criminal Code lays down that a person who causes damage to another shall be liable to a prison sentence of between six months and one year; if the victim is a pregnant woman and the damage results in premature birth, the Criminal Code prescribes a sentence of between two and five years' imprisonment.

10 THE LAW

Admissibility of the application

The government's main submission was that the application was incompatible *ratione materiae* with the provisions of the Convention in that article 2 of the Convention did not apply to the unborn child. They further submitted that the applicant had had a legal remedy capable of redressing her complaint, namely an action for damages against the hospital in the administrative courts. Accordingly, she had not exhausted domestic remedies as required by article 35(1) of the Convention. In the alternative, they considered that the application should be rejected as being manifestly ill-founded.

The applicant complained of the lack of protection of the unborn child under French criminal law and argued that the state had failed to discharge its obligations under article 2 of the Convention by not allowing the offence of unintentional homicide to cover injury to an unborn child. She further submitted that the remedy available in the administrative courts was ineffective as it was incapable of securing judicial acknowledgment of the homicide of her child as such. Lastly, the applicant asserted that she had had a choice between instituting criminal and administrative proceedings and that, while her recourse to the criminal courts had, unforeseeably, proved unsuccessful, the possibility of applying to the administrative courts had in the meantime become statute-barred.

The court observes that an examination of the application raises the issue whether article 2 of the Convention is applicable to the involuntary termination of pregnancy and, if so, whether that provision required a criminal remedy to be available in the circumstances of the case or whether its requirements were satisfied by the possibility of an action for damages in the administrative courts. Considered in those terms, the objections that the application is incompatible *ratione materiae* with the provisions of the Convention and of a failure to exhaust domestic remedies are very closely linked to the substance of the applicant's complaint under article 2 of the Convention. Consequently, the court considers it appropriate to join them to the merits (see, among other authorities, *Airey v Ireland* [1979] 2 EHRR 305 at paragraph 19).

The application cannot therefore be declared inadmissible either as being incompatible *ratione materiae* with the provisions of the Convention or for failure to exhaust domestic remedies within the meaning of article 35(1) of the Convention. The court further considers that the application raises issues of fact and law which require examination on the merits. It accordingly concludes that the application is not manifestly ill-founded. Having also established that no other obstacle to its admissibility exists, the court declares it admissible.

(a) Alleged violation of article 2 of the Convention

The applicant complained of the authorities' refusal to classify the taking of her unborn child's life as unintentional homicide. She argued that the absence of criminal legislation to prevent and punish such an act breached article 2 of the Convention, which provides:

"Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

In defence of any person from unlawful violence;

In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

In action lawfully taken for the purpose of quelling a riot or insurrection."

(11) THE PARTIES' SUBMISSIONS

(a) The applicant

The applicant asserted that the point at which life began had a universal meaning and definition. Even though that was in the nature of things, it was now scientifically proven that all life began at fertilisation. That was an experimental finding. A child that had been conceived but not yet born was neither a cluster of cells nor an object, but a person. Otherwise, it would have to be concluded that in the instant case she had not lost anything. Such an argument was unacceptable for a pregnant woman. Accordingly, the term 'everyone' ('*toute personne*') in article 2 of the Convention was to be taken to mean human beings rather than individuals with the attributes of legal personality. Indeed, that had been the position taken by the *Conseil d'Etat* and the Court of Cassation, which, having agreed to review the compatibility of the Termination of Pregnancy Act with article 2, had been compelled to accept that, from the first moments of its life in the womb, the unborn child came within the scope of that provision (*Conseil d'Etat*, full court, 21 December 1990, *Recueil Lebon*, page 368; Criminal Division of the Court of Cassation, 27 November 1996, *Bulletin criminal* number 431).

In the applicant's submission, French law guaranteed all human beings the right to life from conception, subject to certain exceptions provided for by law in the case of abortion. In that connection, she added that all forms of abortion, with the exception of therapeutic abortion, were incompatible with article 2 of the Convention on account of the interference with the right to life of the conceived child. Even if it were accepted that, subject to certain conditions, states could allow women to have an abortion if they requested one, the contracting states were not at liberty to exclude the unborn child from the protection of article 2. A distinction should be made between the rule and the exception. Section 1 of the Voluntary Termination of Pregnancy Act 1975 (reproduced in article 16 of the Civil Code and article L 2211-1 of the Public-Health Code-see paragraph 28 above) laid down the rule, that of respect for every human being from the beginning of its life, and subsequently provided for an exception in case of necessity and in accordance with conditions defined by law. The legislature had also implicitly accepted that life began at the moment of conception by laying down a number of rules protecting the embryo in vitro in the Bioethics Laws of 29 July 1994 (see paragraph 34 above). Accordingly, although death could in exceptional cases prevail over life, life remained the fundamental value protected by the Convention. The exception should not rule out the possibility of punishing a third party who, through negligence, caused an unborn child to die. The mother's wishes could not be equated with negligence on the part of a third party. The court could therefore validly hold that the contracting parties' legislation should ensure the protection of the conceived child by making unintentional homicide of it a criminal offence, even if their legislation also permitted abortion.

The applicant pointed out that, as the court had held, states had 'a primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by.

Law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions' (see *Kiliç v Turkey*, [2000] ECHR 22492/93 at paragraph 62, and *Mahmut Kaya v Turkey* [2000] ECHR 22535/93 at paragraph 85). In her submission, the new line of case law adopted by the court in *Calvelli v Italy* [2002] ECHR 32967/96 at paragraph 51), to the effect that where the right to life had been infringed unintentionally, the judicial system did not necessarily require the provision of a criminal law remedy, could not be followed in the instant case, because a civil remedy did not 'satisfy the requirement of expressing public disapproval of a serious offence, such as the taking of life' (partly dissenting opinion of Judge Rozakis joined by Judges Bonello and Stráznická in *Calvelli's* case). That would amount to debasing the right to life protected by article 2. The applicant therefore

considered that creating the offence of involuntary termination of pregnancy would fill the vacuum created by the Court of Cassation and would compensate for the state's failure to fulfil its duty to protect the human being at the earliest stages of its development (see paragraph 32 above).

The applicant argued that she had had the option of instituting criminal or administrative proceedings and had been able to choose between the two types of court. She explained that she had chosen to bring criminal proceedings because, firstly, they were the only remedy capable of securing judicial acknowledgment of the unintentional homicide of her child as such and, secondly, because a criminal investigation aided in the task of establishing responsibility. In her submission, there had been nothing to suggest that the criminal proceedings were bound to fail, as the position adopted by the Court of Cassation in her case in 1999 and subsequently confirmed in 2001 and 2002 had by no means been definitively established, in view of the resistance shown in decisions by courts of appeal and the virtually unanimous criticism by legal writers (see paragraph 31 above). For example, in a judgment of 3 February 2000 (Reims Court of Appeal, *Dalloz* 2000, case law, page 873) the Court of Appeal had convicted a motorist of unintentional homicide for driving into another vehicle, seriously injuring the driver, who was eight months pregnant, and subsequently causing the death of the baby (see also Versailles Court of Appeal, 19 January 2000 (UR)). The applicant submitted in conclusion that, on the face of it, she had had no reason to apply to the administrative courts and contended that she could not have known whether to do so until Dr G had been acquitted by the Criminal Court. However, by that time an action against the administrative authorities had already become statute-barred. The remedy in the administrative courts could therefore not be regarded as effective within the meaning of article 35(1) of the Convention.

(b) The government

After emphasising that neither metaphysics nor medicine had given a definitive answer to the question whether and from what moment a foetus was a human being, the government asserted that from a legal standpoint, article 2 of the Convention did not protect the foetus's right to life as a person. The use of the term 'everyone' (*toute personne*) in article 2 and in articles 5, 6, 8 to 11 and 13 of the Convention was such that it could apply only postnatally (*X v UK* [1980] 19 DR).

- (244) The same observation applied to article 2 taken separately, as the restrictions on 'everyone's' right to life provided for in paragraph 2 all concerned, by their very nature, persons who had already been born.

Nor could the 'right to life' referred to in the same article be construed as applying to the foetus; it concerned only the life of persons who had already

been born alive, since it would be neither consistent nor justified to detach that right from the entity in which it was vested, namely the person. Whereas, by contrast, article 4(1) of the 1969 American Convention on Human Rights provided: 'Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception', the signatories to the Convention would not have envisaged such an extension of article 2 of the Convention since by 1950 virtually all the contracting parties had already authorised abortion in certain circumstances. To acknowledge that the foetus had the right to life within the meaning of article 2 would place the mother's life and that of the foetus on an equal footing. Furthermore, prioritising the protection of the foetus's life or restricting it solely in the event of a severe, immediate and insurmountable risk to the mother's life would constitute a step backwards historically and socially and would call into question the legislation in force in many states parties to the Convention.

The government pointed out that the commission had considered whether it was appropriate to recognise the foetus as having the right to life subject to certain restrictions relating to the protection of the mother's life and health (see *X v UK*). They submitted that such a limitation would not allow recourse to abortion for therapeutic, moral or social reasons, which at the time when the text of the Convention was being negotiated had nonetheless already been authorised by the legislation of a number of countries. It would amount to penalising states that had opted for the right to abortion as an expression and application of a woman's autonomy over her own body and her right to control her maternity. The states parties had not intended to confer on the expression 'right to life' a meaning that extended to the foetus and was manifestly contrary to their domestic legislation.

Having regard to the foregoing, the government considered that the Convention was not designed to cover the foetus and that if the European states wished to ensure effective protection of the foetus's right to life, a provision separate from article 2 would have to be drawn up. To construe article 2 as allowing implicit exceptions to the right to life would be at variance with both the letter and the spirit of that article. Firstly, the permissible exceptions formed an exhaustive list, there being no other option where such a fundamental right was concerned; here, the government referred to the *Pretty* case in which the court had stated: '[article 2] sets out the limited circumstances when deprivation of life may be justified' (see *Pretty v UK* [2002] 2 FCR 97 at 127 (paragraph 37)). Secondly, the exceptions were to be understood and construed strictly (*Ocalan v Turkey* [2003] ECHR 46221/99 at paragraph 201).

The government observed that in the instant case the applicant had undergone a therapeutic abortion as a result of acts carried out by the doctor

outside the statutory period within which abortion was permitted, which had been ten weeks at the time and was now 12 weeks (see paragraph 27-28 above). However, if the court were to take the view that that factor rendered article 2 applicable, and that the foetus should therefore be regarded as a person protected by that provision, they pointed out that in several European states the statutory period for abortion was more than 20 weeks, for example in the Netherlands or in England (where abortions could be carried out at up to 24 weeks). Unless domestic legislation and the national authorities' margin of appreciation in this sphere were to be called into question, article 2 could consequently not apply to the unborn child. That also meant, in the government's submission, that the issue of the viability of the foetus was irrelevant in the instant case. It would be paradoxical for states to have a margin of appreciation allowing them to exclude the foetus from protection under article 2 where a pregnancy was terminated intentionally with the mother's consent-and sometimes on that condition alone-if they were not granted the same margin of appreciation in excluding the foetus from the scope of that provision where a pregnancy was interrupted on account of unintentional negligence.

In the alternative, the government pointed out that in French law the foetus was protected indirectly through the pregnant woman's body, of which it was an extension. That was the case where abortion was carried out intentionally but not in one of the cases exhaustively listed in the relevant legislation (article 223-10 of the Criminal Code-see paragraph 25 above) or in the event of an accident. In the latter case, the ordinary remedies for establishing civil liability could be used, and the mother could be awarded compensation for personal, pecuniary and non-pecuniary damage, her pregnant state being necessarily taken into account. Furthermore, under the criminal law, anyone who through inadvertence caused a pregnancy to be terminated could be prosecuted for causing unintentional injury, the destruction of the foetus being regarded as damage to the woman's organs.

The government argued that the applicant could have sought damages from the hospital for the doctor's negligence within the four-year limitation period for actions for damages in the administrative courts. They explained that victims of damage caused by public servants had two distinct remedies available. If the damage resulted from personal negligence on the part of the public servant, not intrinsically connected with the performance of his or her duties, the victim could obtain compensation by suing the person concerned in the ordinary courts, whereas if the damage resulted from negligence that disclosed failings on the part of the authority in question, the matter would be classified as official negligence within the jurisdiction of the administrative courts. The government submitted that in the V judgment of 10 April 1992, the *Conseil d'Etat* had abandoned its position that a hospital department could

incur liability only in cases of gross negligence. Furthermore, an exception to the rule that the hospital was liable in the event of medical negligence occurred where negligence was deemed to be severable from the public service, either because it was purely personal and thus wholly unrelated to the performance of official duties—which had not been the case in this instance—or because it was intentional or exceptionally serious, amounting to inexcusable professional misconduct of such gravity that it ceased to be regarded as indissociable from the performance of the official duties in question. The government explained that personal and official negligence were in fact usually interlinked, particularly in cases of unintentional injury or homicide. For that reason, the *Conseil d'Etat* had accepted long ago that the personal liability of a public servant did not exclude of the liability of the authority to which he or she was attached (Lemonnier judgment, 1918). The government therefore considered that the applicant had had the possibility of seeking redress in the administrative courts as soon as the damage had occurred, without having to wait for the criminal proceedings to end. Such an action would have been all the more likely to succeed as for the hospital to be held liable only ordinary negligence had to be made out, and the expert reports ordered by the courts had referred precisely to the hospital department's organisational problems. The administrative courts could therefore legitimately have been expected to reach the same conclusion.

The government asserted that that remedy had been effective and adequate in terms of the positive obligations under article 2 of the Convention (see *Calvelli's* case) and that the applicant had, through her own inaction or negligence, deprived herself of a remedy which had none the less been available to her for four years from the time when the damage had occurred, and in respect of which she could have received advice from her lawyers. In *Calvelli's* case there had been no doubt that article 2 of the Convention was applicable to a newborn child. In the instant case, in which the applicability of article 2 was questionable, there were therefore additional reasons for considering that the possibility of using civil or administrative remedies to establish liability was sufficient. In the government's submission, such an action for damages could have been based on the taking of the life of the child the applicant was carrying, since the relevant case law of the administrative courts did not appear thus far to preclude the possibility of affording embryos protection under article 2 of the Convention (*Conseil d'Etat*, full court, Confédération nationale des associations familiales catholiques and others, judgment of 21 December 1990—see paragraph 47 above). At the material time, in any event, the issue had not been clearly resolved by the *Conseil d'Etat*.

In conclusion, the government considered that, even supposing that article 2 was applicable in the instant case, that provision did not require the

life of the foetus to be protected by the criminal law in the event of unintentional negligence, as was the position in many European countries.

(12) THIRD-PARTY INTERVENTIONS

(a) Center for Reproductive Rights

The Center for Reproductive Rights (CRR) submitted that unborn foetuses could not be treated as persons under the law and hence covered by article 2 of the Convention because there was no legal basis for such an approach (i) and because granting them that status would interfere with women's basic human rights (ii). Lastly, they argued that it would be inadvisable to extend rights to the foetus because the loss of a wanted foetus constituted an injury to the expectant mother (iii).

The assertion that a foetus was a person ran counter to the case law of the Convention institutions, the legislation of the member states of the Council of Europe, international standards and the case law of courts throughout the world. Relying on the decisions of *X v UK*, *H v Norway* [1992] 73 DR 155 and, most recently, *Boso v Italy* app no 50490/99 (5 September 1992 (UR)), in which the commission and the court had held that granting a foetus the same rights as a person would place unreasonable limitations on the article 2 rights of persons already born, the CRR saw no reason to depart from that conclusion unless the right to abortion in all Council of Europe member states were to be called into question.

The foetus was not recognised as a person in European domestic legislation or by the national courts in interpreting it. The CRR drew attention to the Court of Cassation's settled position (see paragraph 29 above), which was consistent with the distinction made in French law between the concepts of 'human being' and 'person', the former being a biological concept and the latter a legal term attached to a legal category whose rights took effect and were perfected at birth, although in certain circumstances the rights acquired at birth were retroactive to conception. The national courts had also addressed the issue of the legal status of the person in the context of abortion. For example, the Austrian and Netherlands Constitutional Courts had held that article 2 should not be interpreted as protecting the unborn child, and the French Constitutional Council had found no conflict between legislation on the voluntary termination of pregnancy and the constitutional protection of the child's right to health (decision no 74-54 of 15 January 1975). That reading was consistent with the relevant legislation throughout Europe: 39 member states of the Council of Europe—the exceptions being Andorra, Ireland, Liechtenstein, Malta, Poland and San Marino, which had maintained severe restrictions on abortion (with only very narrow therapeutic

exceptions)-permitted a woman to terminate a pregnancy without restriction during the first trimester or on very broad therapeutic grounds.

With regard to international and regional standards, the CRR observed that the International Covenant on Civil and Political Rights provided no indication that the right to life applied to a foetus. It added that the Human Rights Committee had routinely emphasised the threat to women's lives posed by illegal abortions. The same was true of the Convention on the Rights of the Child and the interpretation by the Committee on the Rights of the Child of article 6, which provided: 'Every child has the inherent right to life.' On several occasions the committee had stated its concern about the difficulties of adolescent girls in having their pregnancies terminated in safe conditions and had expressed its fears as to the impact of punitive legislation on maternal mortality rates. The case law of the Inter-American regional system, notwithstanding article 4 of the American Convention on Human Rights (see paragraph 52 above), did not provide absolute protection to a foetus before birth. The Inter-American Commission on Human Rights had held in the *Baby Boy* case.

(See *Baby Boy* case 2141 6 March 1981, (UR)). That article 4 did not preclude liberal national-level abortion legislation. Furthermore, the Organisation of African Unity had adopted the Protocol on the Rights of Women on 11 July 2003 to supplement the African Charter on Human and Peoples' Rights of 27 June 1981, broadening the protection of the right of women to terminate a pregnancy.

Lastly, with regard to non-European states, the CRR noted that the Supreme Courts of Canada and the United States had declined to treat unborn foetuses as persons under the law (in the cases of *Winnipeg Child Family Services v G* [1997] 152 DLR (4th) 193 and *Roe v Wade* [1973] 410 US 113). The United States Supreme Court had reaffirmed that position in a recent case in 2000 (*Stenberg v Carhart* [2000] 530 US 914), in which it had declared unconstitutional a state law prohibiting certain methods of abortion and providing no protection for women's health. Similarly, in South Africa, ruling on a constitutional challenge to the recently enacted Choice on Termination of Pregnancy Act, which permitted abortion without restriction during the first trimester and on broad grounds at later stages of pregnancy, the High Court had considered that the foetus was not a legal person (case of *Christian Lawyers Association of South Africa and Others v Minister of Health* [1998] 11 BCLR 1434).

In the CRR's submission, recognition of the foetus's rights interfered, in particular, with women's fundamental right to a private life. In the case of *Brüggemann and Scheuten v Germany* [1977] 10 DR 100, the commission had implicitly accepted that an absolute prohibition on abortion would be an

impermissible interference with privacy rights under article 8 of the Convention. Subsequently, while rejecting the suggestion that article 2 protected the right to life of foetuses, the Convention institutions had further recognised that the right to respect for the private life of the pregnant woman, as the person primarily concerned by the pregnancy and its continuation or termination, prevailed over the father's rights (see paragraph 61 above). In addition to respect for private life, the preservation of the pregnant woman's life and health took precedence. In holding that restrictions on the exchange of information on abortion created a risk to the health of women whose pregnancies posed a threat to their lives, the court had ruled that the injunction in question had been 'disproportionate to the aims pursued' and that, consequently, a woman's health interest prevailed over a state's declared moral interest in protecting the rights of a foetus (see *Open Door Counselling and Dublin Well Woman Centre v Ireland* [1992] 18 BMLR 1).

In the CRR's submission, declining to recognise the foetus as a person under article 2 did not preclude a remedy for injuries such as the one that had given rise to the instant case. The loss of a wanted foetus was an injury suffered by the expectant mother. Consequently, the rights that were entitled to protection in the instant case were those of the applicant and not those of the foetus she had lost. It was within the power of the legislature of every Council of Europe member state to recognise both civil and criminal offences committed by individuals who injured a woman by causing the termination of a wanted pregnancy.

(b) Family Planning Association

The Family Planning Association (FPA) set out primarily to argue that the right to life enshrined in article 2 of the Convention should not be interpreted as extending to the unborn (i). In support of that argument, the FPA provided the court with information on the current legal position on abortion in the member states of the Council of Europe (ii) and a summary of the legal status of the unborn in United Kingdom law (iii).

The FPA pointed out that article 2 was drafted in such a way as to allow only very limited exceptions to the prohibition it imposed on intentional deprivation of life. Voluntary termination of pregnancy was not one of those exceptions; nor could any of the exceptions be interpreted to include that practice. Recent evidence showed that voluntary termination of pregnancy on request in the first trimester was now widely accepted across Europe, as was termination on certain grounds in the second trimester. If article 2 were interpreted as applying to the unborn from the moment of conception, as contended by the applicant, the court would be calling into question the laws on abortion enacted in most contracting states. Furthermore, that would render illegal the majority of methods of contraception currently in use

throughout Europe, since they acted or could act after conception to prevent implantation. There would therefore be devastating implications in terms of both individual choices and lives and social policy. The English High Court had recently acknowledged that that would be the undesirable consequence if it were to accept the argument of the Society for the Protection of Unborn Children that emergency hormonal contraceptives were abortifacients because pregnancy began at conception (see *R (on the application of Smeaton) v Secretary of State for Health* [2002] EWHC 610 (Admin), [2002] 2 FCR 193).

The possibility that article 2 applied to the foetus but with certain implied limitations, for example only after a critical point in time (viability or some other gestational stage) should likewise be rejected. Recent evidence showed that, beyond the broad consensus identified above, there was a complete lack of any generally accepted standard in relation to the gestational limit on the availability of abortion, the grounds on which termination was available after that point in time or the conditions that had to be satisfied.

Recent survey information was available (*Abortion Legislation in Europe*, International Planned Parenthood Federation (IPPF) European Network, July 2002, and *Abortion Policies: a Global Review*, UN Population Division, June 2002) in relation to the legal position on abortion in the Council of Europe member states with the exception of Serbia and Montenegro. The surveys showed that four states essentially prohibited abortion, except where the pregnant woman's life was endangered (Andorra, Liechtenstein, San Marino and Ireland), whereas the great majority of member states provided for much wider access to abortion services. Such evidence of the availability of abortion across Europe was in keeping with the general trend towards the liberalisation of abortion laws. No general consensus emerged from the practice of the member states as to the period during which abortion was permitted after the first trimester or the conditions that had to be satisfied for abortion to be available in the later stages of pregnancy. Furthermore, the grounds on which abortion was permitted without a time-limit were many and varied. The FPA accordingly contended that if article 2 were interpreted as applying to the unborn from some particular point in time that would call into question the legal position in a number of states where termination was available on certain grounds at a later stage than that determined by the court.

It was now a settled general principle of the common law that in the United Kingdom legal personality crystallised upon birth. Up until that point, the unborn had no legal personality independent of the pregnant woman. However, despite that lack of legal personality, the interests of the unborn were often protected while they were in the womb, even though those interests could not be realised as enforceable rights until the attainment of legal personality on birth.

In the civil law, that specifically meant that prior to birth, the unborn had no standing to bring proceedings for compensation or other judicial remedies in relation to any harm done or injury sustained while in the womb, and that no claim could be made on their behalf (see *Paton v Trustees of BPAS* [1978] 2 All ER 987, [1979] QB 276). Efforts had been made to persuade the courts dealing with such cases that according to the law of succession, the unborn could be deemed to be 'born' or 'persons in being' whenever their interests so demanded. However, the *Burton* case confirmed that that principle was also subject to the live birth of a child (*Burton v Islington Health Authority, De Martell v Merton and Sutton Health Authority* [1992] 2 FCR 845 at 851-852, [1992] 3 All ER 833 at 839).

In the criminal law, it was well established that the unborn were not treated as legal persons for the purpose of the common law rules of murder or manslaughter. In *A-Gs Reference* (number 3 of 1994) [1997] 3 All ER 936, [1998] AC 245, the House of Lords had concluded that the injury of the unborn without a live birth could not lead to a conviction for murder, manslaughter or any other violent crime. The rights of the unborn were further protected by the criminal law on abortion. Sections 58 and 59 of the Offences against the Person Act 1861 had introduced the statutory offences of procuring abortion and procuring the means to cause abortion. Similarly, by section 1 of the Infant Life (Preservation) Act 1929 the destruction of the unborn, where capable of live birth, was a serious offence. Those Acts were still in effect. Abortion and child destruction remained illegal, subject to the application of the Abortion Act 1967.

(c) The court's assessment

The applicant complained that she had been unable to secure the conviction of the doctor whose medical negligence had caused her to have to undergo a therapeutic abortion. It has not been disputed that she intended to carry her pregnancy to full term and that her child was in good health. Following the material events, the applicant and her partner lodged a criminal complaint, together with an application to join the proceedings as civil parties, alleging unintentional injury to the applicant and unintentional homicide of the child she was carrying. The courts held that the prosecution of the offence of unintentional injury to the applicant was statute-barred and, quashing the Court of Appeal's judgment on the second point, the Court of Cassation held that, regard being had to the principle that the criminal law was to be strictly construed; a foetus could not be the victim of unintentional homicide. The central question raised by the application is whether the absence of a criminal remedy within the French legal system to punish the unintentional destruction of a foetus constituted a failure on the part of the state to protect by law the right to life within the meaning of article 2 of the Convention.

(d) Existing case law

Unlike article 4 of the American Convention on Human Rights, which provides that the right to life must be protected 'in general, from the moment of conception', article 2 of the Convention is silent as to the temporal limitations of the right to life and, in particular, does not define 'everyone' ('*toute personne*') whose 'life' is protected by the Convention. The court has yet to determine the issue of the 'beginning' of 'everyone's right to life' within the meaning of this provision and whether the unborn child has such a right.

To date it has been raised solely in connection with laws on abortion. Abortion does not constitute one of the exceptions expressly listed in paragraph 2 of article 2 but the commission has expressed the opinion that it is compatible with the first sentence of article 2(1) in the interests of protecting the mother's life and health because 'if one assumes that this provision applies at the initial stage of the pregnancy, the abortion is covered by an implied limitation, protecting the life and health of the woman at that stage, of the "right to life" of the foetus' (see *X v UK* [1980] 19 DR 244 at 253).

Having initially refused to examine *in abstracto* the compatibility of abortion laws with article 2 of the Convention (see *X v Norway* application number 867/60 (29 May 1961, UR), and *X v Austria* [1976] 7 DR 87), the commission acknowledged in the case of *Brüggemann and Scheuten v Germany* that women complaining under article 8 of the Convention about the Constitutional Court's decision restricting the availability of abortions had standing as victims. It stated on that occasion 'pregnancy cannot be said to pertain uniquely to the sphere of private life. Whenever a woman is pregnant her private life becomes closely connected with the developing foetus' (paragraph 59). However, the commission did not find it 'necessary to decide, in this context, whether the unborn child is to be considered as "life" in the sense of article 2 of the Convention, or whether it could be regarded as an entity which under article 8(2) could justify an interference "for the protection of others"' (paragraph 60). It expressed the opinion that there had been no violation of article 8 of the Convention because 'not every regulation of the termination of unwanted pregnancies constitutes an interference with the right to respect for the private life of the mother' (paragraph 61), while emphasising 'There is no evidence that it was the intention of the Parties to the Convention to bind themselves in favour of any particular solution' (paragraph 64).

In the *X v UK* decision cited above the commission considered an application by a man complaining that his wife had been allowed to have an abortion on health grounds. While it accepted that the potential father could be regarded as the 'victim' of a violation of the right to life, it considered that the term 'everyone' in several articles of the Convention could not apply

prenatally, but observed that 'such application in a rare case—e.g. Under Article 6, paragraph 1—cannot be excluded' (see *X v UK* [1980] 19 DR 244 at 259; for such an application in connection with access to a court, see *Reeve v UK* [1994] 79A DR 146). The commission added that the general usage of the term 'everyone' ('*toute personne*') and the context in which it was used in article 2 of the Convention did not include the unborn. As to the term 'life' and, in particular, the beginning of life, the commission noted a 'divergence of thinking on the question of where life begins' and added 'While some believe that it starts already with conception, others tend to focus upon the moment of nidation, upon the point that the foetus becomes "viable", or upon live birth' (see *X v UK* [1980] 19 DR 244 at 250 (paragraph 12)).

The commission went on to examine whether article 2 was 'to be interpreted: as not covering the foetus at all; as recognising a 'right to life' of the foetus with certain implied limitations; or as recognising an absolute 'right to life' of the foetus'. Although it did not express an opinion on the first two options, it categorically ruled out the third interpretation, having regard to the need to protect the mother's life, which was indissociable from that of the unborn child: 'The "life" of the foetus is intimately connected with, and it cannot be regarded in isolation of, the life of the pregnant woman. If article 2 were held to cover the foetus and its protection under this article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the "unborn life" of the foetus would be regarded as being of a higher value than the life of the pregnant woman.' (See *X v UK* [1980] 19 DR 244 at 252 (paragraph 19)). The commission adopted that solution, noting that by 1950 practically all the contracting parties had 'permitted abortion when necessary to save the life of the mother' and that in the meantime the national law on termination of pregnancy had 'shown a tendency towards further liberalisation' (paragraph 20).

In the case of *H v Norway*, concerning an abortion carried out on non-medical grounds against the father's wishes, the commission added that article 2 required the state not only to refrain from taking a person's life intentionally but also to take appropriate steps to safeguard life. It considered that it did not have to decide 'whether the foetus may enjoy a certain protection under article 2, first sentence', but did not exclude the possibility that 'in certain circumstances this may be the case notwithstanding that there is in the contracting states a considerable divergence of views on whether or to what extent article 2 protects the unborn life'. It further noted that in such a delicate area the contracting states had to have a certain discretion, and concluded that the mother's decision, taken in accordance with Norwegian legislation, had not exceeded that discretion.

The court has only rarely had occasion to consider the application of article 2 to the foetus. In the case of *Open Door* and *Dublin Well Woman* (previously cited judgment) the Irish government relied on the protection of the life of the unborn child to justify their legislation prohibiting the provision of information concerning abortion facilities abroad. The only issue that was resolved was whether the restrictions on the freedom to receive and impart the information in question had been necessary in a democratic society, within the meaning of article 10(2) of the Convention, to pursue the 'legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect' (see *Open Door Counselling and Dublin Well Woman Centre v Ireland* [1992] 18 BMLR 1 at paragraph 63), since the court did not consider it relevant to determine 'whether a right to abortion is guaranteed under the Convention or whether the foetus is encompassed by the right to life as contained in article 2' (paragraph 66). Recently, in circumstances similar to those in the above-mentioned case of *H v Norway*, where a woman had decided to terminate her pregnancy against the father's wishes, the court held that it was not required to determine 'whether the foetus may qualify for protection under the first sentence of article 2 as interpreted [in the case law relating to the positive obligation to protect life]', and continued: 'Even supposing that, in certain circumstances, the foetus might be considered to have rights protected by article 2 of the Convention ° in the instant case ° [the] pregnancy was terminated in conformity with section 5 of Law no 194 of 1978'-a law which struck a fair balance between the woman's interests and the need to ensure protection of the foetus (see *Boso v Italy* application number 50490/99 (5 September 1992, UR).

It follows from this recapitulation of the case law that in the circumstances examined to date by the Convention institutions-that is, in the various laws on abortion-the unborn child is not regarded as a 'person' directly protected by article 2 of the Convention and that if the unborn do have a 'right' to 'life', it is implicitly limited by the mother's rights and interests. The Convention institutions have not, however, ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child. That is what appears to have been contemplated by the commission in considering that 'article 8(1) cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother' (see *Briggemann and Scheuten v Germany* (1977) 10 DR 100 at 116-117 (paragraph 61) and by the court in the above-mentioned *Boso* decision. It is also clear from an examination of these cases that the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms claimed by a woman, a mother or a father in relation to one another or vis-à-vis an unborn child.

(e) Approach in the Instant Case

The special nature of the instant case raises a new issue. The court is faced with a woman who intended to carry her pregnancy to term and whose

unborn child was expected to be viable, at the very least in good health. Her pregnancy had to be terminated as a result of an error by a doctor and she therefore had to have a therapeutic abortion on account of negligence by a third party. The issue is consequently whether, apart from cases where the mother has requested an abortion, harming a foetus should be treated as a criminal offence in the light of article 2 of the Convention, with a view to protecting the foetus under that article. This requires a preliminary examination of whether it is advisable for the court to intervene in the debate as to who is a person and when life begins, in so far as article 2 provides that the law must protect 'everyone's right to life'.

As is apparent from the above recapitulation of the case law, the interpretation of article 2 in this connection has been informed by a clear desire to strike a balance, and the Convention institutions' position in relation to the legal, medical, philosophical, ethical or religious dimensions of defining the human being has taken into account the various approaches to the matter at national level. This has been reflected in the consideration given to the diversity of views on the point at which life begins, of legal cultures and of national standards of protection, and the state has been left with considerable discretion in the matter, as the opinion of the European Group on Ethics at Community level appositely puts it 'the Community authorities have to address these ethical questions taking into account the moral and philosophical differences, reflected by the extreme diversity of legal rules applicable to human embryo research. It is not only legally difficult to seek harmonisation of national laws at Community level, but because of lack of consensus, it would be inappropriate to impose one exclusive moral code'. (See paragraph 40 above).

It follows that the issue of when the right to life begins comes within the margin of appreciation which the court generally considers that states should enjoy in this sphere, notwithstanding an evaluative interpretation of the Convention, a 'living instrument which must be interpreted in the light of present-day conditions' (See *Tyler v UK* [1978] 2 EHRR 1 at paragraph 31, and subsequent case law). The reasons for that conclusion are, firstly, that the issue of such protection has not been resolved within the majority of the contracting states themselves, in France in particular, where it is the subject of debate (see paragraph 83 below) and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life (see paragraph 84 below).

The court observes that the French Court of Cassation, in three successive judgments delivered in 1999, 2001 and 2002 (see paragraph 22 and 29 above), considered that the rule that offences and punishment must be defined by law, which required criminal statutes to be construed strictly, excluded acts causing

a fatal injury to a foetus from the scope of article 221-6 of the Criminal Code, under which unintentional homicide of 'another' is an offence. However, if, as a result of unintentional negligence, the mother gives birth to a live child who dies shortly after being born, the person responsible may be convicted of the unintentional homicide of the child (see paragraph 30 above). The first-mentioned approach, which conflicts with that of several courts of appeal (see paragraph 21 and 50 above), was interpreted as an invitation to the legislature to fill a legal vacuum. That was also the position of the Criminal Court in the instant case: 'The court cannot create law on an issue which [the legislature has] not yet succeeded in defining.' The French parliament attempted such a definition in proposing to create the offence of involuntary termination of pregnancy (see paragraph 32 above), but the Bill containing that proposal was lost, on account of the fears and uncertainties that the creation of the offence might arouse as to the determination of when life began, and the disadvantages of the proposal, which were thought to outweigh its advantages (see paragraph 33 above). The court further notes that alongside the Court of Cassation's repeated rulings that article 221-6 of the Criminal Code does not apply to foetuses, the French parliament is currently revising the 1994 bioethics laws, which added provisions to the Criminal Code on the protection of the human embryo (see paragraph 25 above) and required re-examination in the light of scientific and technological progress (see paragraph 34 above). It is clear from this overview that in France, the nature and legal status of the embryo and/or the foetus are currently not defined and that the manner in which it is to be protected will be determined by very varied forces within French society.

At European level, the court observes that there is no consensus on the nature and status of the embryo and/or foetus (see paragraph 39 and 40 above), although they are beginning to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation. At best, it may be regarded as common ground between states that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person-enjoying protection under the civil law, moreover, in many states, such as France, in the context of inheritance and gifts, and also in the United Kingdom (see paragraph 72 above)-require protection in the name of human dignity, without making it a 'person' with the 'right to life' for the purposes of article 2. The Oviedo Convention on Human Rights and Biomedicine, indeed, is careful not to give a definition of the term 'everyone' and its explanatory report indicates that, in the absence of a unanimous agreement on the definition, the member states decided to allow domestic law to provide clarifications for the purposes of the application of that Convention (see paragraph 36 above). The same is true of the Additional

Protocol on the Prohibition of Cloning Human Beings and the draft Additional Protocol on Biomedical Research, which do not define the concept of 'human being' (see paragraph 37 and 38 above). It is worth noting that the court may be requested under article 29 of the Oviedo Convention to give advisory opinions on the interpretation of that instrument.

Having regard to the foregoing, the court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of article 2 of the Convention ('*personne*' in the French text). As to the instant case, it considers it unnecessary to examine whether the abrupt end to the applicant's pregnancy falls within the scope of article 2, seeing that, even assuming that that provision was applicable, there was no failure on the part of the respondent state to comply with the requirements relating to the preservation of life in the public-health sphere. With regard to that issue, the court has considered whether the legal protection afforded the applicant by France in respect of the loss of the unborn child she was carrying satisfied the procedural requirements inherent in article 2 of the Convention.

In that connection, it observes that the unborn child's lack of a clear legal status does not necessarily deprive it of all protection under French law. However, in the circumstances of the present case, the life of the foetus was intimately connected with that of the mother and could be protected through her, especially as there was no conflict between the rights of the mother and the father or of the unborn child and the parents, the loss of the foetus having been caused by the unintentional negligence of a third party.

In the aforementioned *Boso v Italy* decision, the court said that even supposing that the foetus might be considered to have rights protected by article 2 of the Convention (see paragraph 79 above), Italian law on the voluntary termination of pregnancy struck a fair balance between the woman's interests and the need to ensure protection of the unborn child. In the present case, the dispute concerns the involuntary killing of an unborn child against the mother's wishes, causing her particular suffering. The interests of the mother and the child clearly coincided. The court must therefore examine, from the standpoint of the effectiveness of existing remedies, the protection which the applicant was afforded in seeking to establish the liability of the doctor concerned for the loss of her child in utero and to obtain compensation for the abortion she had to undergo. The applicant argued that only a criminal remedy would have been capable of satisfying the requirements of article 2 of the Convention. The court does not share that view, for the following reasons.

The court reiterates that the first sentence of article 2, which ranks as one of the most fundamental provisions in the Convention and also enshrines one

of the basic values of the democratic societies making up the Council of Europe (see *McCann v UK* [1995] 21 EHRR 97 at paragraph 147), requires the state not only to refrain from the 'intentional' taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see, for example, *LCB v UK* [1998] 4 BHRC 447 at paragraph 36).

Those principles apply in the public-health sphere too. The positive obligations require states to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (see *Powell v UK* application number 45305/99 (4 May 2000, UR) and *Calvelli's* case, paragraph 49).

Although the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently (see *Perez v France* [2004] ECHR 47287/99 at paragraph 70), the court has stated on a number of occasions that an effective judicial system, as required by article 2, may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation imposed by article 2 to set up an effective judicial system does not necessarily require the provision of a criminal law remedy in every case. In the specific sphere of medical negligence, 'the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged' (see *Calvelli's* case at paragraph 51; *Lazzarini v Italy* application number 53749/00 (7 November 2002 (UR); and *Mastromatteo v Italy* [2002] ECHR 37703/97 at paragraph 90).

In the instant case, in addition to the criminal proceedings which the applicant instituted against the doctor for unintentionally causing her injury—which, admittedly, were terminated because the offence was covered by an amnesty, a fact that did not give rise to any complaint on her part—she had the possibility of bringing an action for damages against the authorities on account of the doctor's alleged negligence (see *Kress v France* [2001] ECHR 39594/98 at paragraphs 14 *et seq*). Had she done so, the applicant would have been entitled to have an adversarial hearing on her allegations of negligence (see *Powell's* case) and to obtain redress for any damage sustained. A claim for compensation in the administrative courts would have had fair prospects of success and the applicant could have obtained damages from the hospital. That is apparent from the findings

clearly set out in the expert reports (see paragraph 16 above) in 1992-before the action had become statute-barred-concerning the poor organisation of the hospital department in question and the serious negligence on the doctor's part, which none the less, in the Court of Appeal's opinion (see paragraph 21 above), did not reflect a total disregard for the most fundamental principles and duties of his profession such as to render him personally liable.

The applicant's submission concerning the fact that the action for damages in the administrative courts was statute-barred cannot succeed in the court's view. In this connection, it refers to its case law to the effect that the 'right to a court', of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the state, which enjoys a certain margin of appreciation in this regard (see, among other authorities, *Brualla Gómez de la Torre v Spain* [1999] ECHR 26737/95 at paragraph 33). These legitimate restrictions include the imposition of statutory limitation periods, which, as the court has held in personal injury cases, 'serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time' (see *Stubbings v UK* [1997] 3 FCR 157 at 170 paragraph 51).

In the instant case, a four-year limitation period does not in itself seem unduly short, particularly in view of the seriousness of the damage suffered by the applicant and her immediate desire to prosecute the doctor. However, the evidence indicates that the applicant deliberately turned to the criminal courts, apparently without ever being informed of the possibility of applying to the administrative courts. Admittedly, parliament recently extended the time allowed to ten years under the Law of 4 March 2002 (see paragraph 28 above). It did so with a view to standardising limitation periods for actions for damages in all courts, whether administrative or ordinary. This enables the general emergence of a system increasingly favourable to victims of medical negligence to be taken into account, an area in which the administrative courts appear capable of striking an appropriate balance between consideration of the damage to be redressed and the excessive 'judicialisation' of the responsibilities of the medical profession. The court does not consider, however, that these new rules can be said to imply that the previous period of four years was too short.

In conclusion, the court considers that in the circumstances of the case, an action for damages in the administrative courts could be regarded as an effective remedy that was available to the applicant. Such an action, which she failed to use, would have enabled her to prove the medical negligence she alleged and to obtain

full redress for the damage resulting from the doctor's negligence, and there was therefore no need to institute criminal proceedings in the instant case.

The court accordingly concludes that, even assuming that article 2 was applicable in the instant case (see paragraph 85 above), there has been no violation of article 2 of the Convention.

(13) FOR THESE REASONS, THE COURT

Joins to the merits unanimously the government's preliminary objections of the application's incompatibility *ratione materiae* with the provisions of the Convention and of failure to exhaust domestic remedies, and *dismisses* them;

Declares unanimously the application *admissible*;

Holds by 14 votes to three that there has been no violation of article 2 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 July 2004.

In accordance with article 45(2) of the Convention and rule 74(2) of the Rules of Court, the following separate opinions are annexed to this judgment: (a) separate opinion of Mr Costa; (b) separate opinion of Mr Rozakis, joined by Mr Caflisch, Mr Fischbach, Mr Lorenzen and Mrs Thomassen; (c) dissenting opinion of Mr Ress; and (d) dissenting opinion of Mrs Mularoni joined by Mrs Stráznická.

(14) SEPARATE OPINION OF JUDGE COSTA

(a) Translation

In this case, in which a doctor's negligence caused a pregnancy to be terminated after almost six months against the wishes of the woman carrying the unborn child, the court has found no violation of article 2 of the Convention.

Its reasoning, however, is cautious: the court decided that it was unnecessary to determine whether article 2 was applicable, holding that even assuming it was, there has been no violation on the facts.

I voted in favour of finding no violation of article 2, but would have preferred the court to hold that article 2 was applicable, even if such a conclusion is not self-evident. As I will attempt to demonstrate, such a decision would perhaps have been clearer with only minimal inconvenience as regards the scope of the judgment.

It seems to me, firstly, that it is not the court's role *as a collegiate body* to consider cases from a primarily ethical or philosophical standpoint (and, in my view, it has successfully avoided this pitfall in this judgment). The court must

endeavour to remain within its own-legal-sphere of competence, although I accept that law does not exist in a vacuum and is not a chemically pure substance detached from moral or societal considerations. Whether or not they choose to express their personal opinions as article 45 of the Convention entitles (but does not oblige) them to do, individual judges are not, in my opinion, subject to the same constraints. The present case enters into the realm of deep personal convictions and for my Pt I thought it necessary and perhaps helpful to set out my views. As the reader will have understood, they slightly differ from those of the majority.

From the ethical standpoint, the most natural way to attempt to interpret article 2 of the Convention ('Everyone's right to life shall be protected by *law*'- '*le droit de toute personne à la vie est protégé par la loi*' in the French text) is to ask what is meant by 'everyone' (*personne*) and when does life begin. It is very difficult to obtain unanimity or agreement here, as ethics are too heavily dependent on individual ideology. In France, the National Advisory Committee, which has been doing a remarkable job for the past twenty years and has issued a number of opinions on the human embryo (a term it generally prefers to 'foetus' at all stages of development), has not been able to come up with a definitive answer to these questions. This is only to be expected, particularly bearing in mind the committee's composition, which President Mitterrand decided at its inception should be pluralist. To say (as the committee has done since issuing its first opinion in 1984) that 'the embryo must be *recognised as a potential human person*' does not solve the problem because a being that is recognised as potential is not necessarily a being and may in fact, by converse implication, not be one. As to life and, therefore, the point at which life begins, everybody has his or her own conception (see the committee's fifth opinion issued in 1985). All this shows is that there perhaps exists a right for a potential person to a potential life; for lawyers, however, there is a world of difference between the potential and the actual.

What is true for the ethical bodies of states such as the respondent state is also true internationally. The judgment rightly notes that the Oviedo Convention on Human Rights and Biomedicine (a Council of Europe sponsored instrument signed in 1997) does not define what is meant by 'everyone'. Nor does it provide any definition of 'human being', despite the importance it attaches to the dignity, identity, primacy, interests and welfare of human beings. Nor is there any reference to the beginning of life.

Does the present inability of ethics to reach a consensus on what is a person and who is entitled to the right to life prevent the law from defining these terms? I think not. It is the task of lawyers, and in particular judges, especially human rights judges, to identify the notions-which may, if necessary, be the autonomous notions the court has always been prepared to

use—that correspond to the words or expressions in the relevant legal instruments (in the court's case, the Convention and its Protocols). Why should the court not deal with the terms 'everyone' and the 'right to life' (which the European Convention on Human Rights does not define) in the same way it has done from its inception with the terms 'civil rights and obligations', 'criminal charges' and 'tribunals', even if we are here concerned with philosophical, not technical, concepts?

Indeed, the court has already embarked upon this course in the sphere of article 2, at least as regards the right to life, for instance, by imposing positive obligations on states to protect human life, or holding that in exceptional circumstances the use of potentially lethal force by state agents may lead to a finding of a violation of article 2. Through its case law, therefore, the court's has broadened the notions of the right to life and unlawful killing, if not the notion of life itself.

Conversely, I do not believe that it is possible to take the convenient way out of saying that Mrs Vo, a 'person', had a right to life (of her unborn child). It is true that the notion of who constitutes a victim has been enlarged by the case law: a complaint by a nephew alleging a violation of article 2 on account of his uncle's murder has thus been declared admissible (*Yasa v Turkey* [1998] ECHR 22495/93). However, in the instant case, the court is concerned with a pleaded right to life of the unborn child and this type of decision can only apply to the applicant's case if it is accepted that the unborn child itself has a right to life, since, in order to be a victim within the meaning of article 34 of the Convention, Mrs Vo must also be a victim of a violation that is recognised by the Convention, *quod est demonstrandum*.

Indeed, it seems to me that the commission and the court have already worked on the assumption that article 2 is applicable to the unborn child (without, however, affirming that the unborn child is a person). In a number of cases they have held that, even if they did not have to decide the question of applicability, there was in any event no violation of article 2 on the facts, for instance in the case of a termination of pregnancy in accordance with legislation 'which struck a fair balance between the woman's interests and the need to ensure protection of the foetus' (see *Boso v Italy* application number 50490/99 (5 September 1992 (UR), which is cited in the judgment; but also, in less forthright terms, the commission's decision of 19 May 1992 in another cited case, *H v Norway*). Had article 2 been considered to be entirely inapplicable, there would have been no point—and this applies to the present case also in examining the question of foetal protection and the possible violation of article 2, or in using this reasoning to find that there had been no violation of that provision.

It is possible to turn to the law of the respondent state, not because it is a model to be imposed on others, but because it is directly in issue in the present case. As far back as 1990, the *Conseil d'Etat* held that the French Voluntary Termination of Pregnancy Act (which the Constitutional Council had declared in its decision no 74-DC of 15 January 1975 was not unconstitutional, while at the same time declining jurisdiction to examine its compatibility with the Convention) was not incompatible with article 2 of the Convention or article 6 of the International Covenant on Civil and Political Rights (which provides: 'Every human being has the inherent right to life. This right shall be protected by law'). Above all, the *Conseil d'Etat* thereby recognised unambiguously, albeit implicitly, that that Act came within the scope of article 2 (see its decision of 21 December 1990, *Confédération nationale des associations familiales catholiques*, published at page 369 of the *Recueil Lebon*, and the submissions of Mr Bernard Stirn, which clarify it).

To my mind, this judgment of the highest French administrative court demonstrates that a decision by the European Court of Human Rights in which it is plainly stated that the 'end of life' of an unborn child is within the scope of article 2 of the Convention would not threaten at least not in essence—the domestic legislation of a large number of European countries that makes the voluntary termination of pregnancy lawful, subject, of course, to compliance with certain conditions. In a number of European states, such legislation has been held to be consistent with the domestic Constitution and even with article 2 of the Convention. The Norwegian Supreme Court so found in 1983. The German Federal Constitutional Court and the Spanish Constitutional Court have also accepted that the right to life, as protected by article 2 of the Convention, can apply to the embryo or the foetus (the question whether that right is *absolute* being a separate issue). These are examples of decisions in which the highest courts of individual countries have recognised that the right to life, whether set out in article 2 of the European Convention on Human Rights or enshrined in domestic constitutional principles of like content and scope, *applies* to the foetus, without being absolute. Is there any reason why the court, which aspires to the role of a constitutional court within the European human rights order, should be less bold?

Obviously, were the court to rule that article 2 was applicable, either on its wording or in substance, it would have to examine *in any event* (and not just on the facts of the individual case as here) whether or not it had been complied with. This, though, should not be of concern to it either. In the aforementioned *Boso* decision, it applied the 'fair balance' test to the impugned statute, so that it would have had to reach the opposite conclusion had the legislation been different and not strike a fair balance between the protection of the foetus and the mother's interests. Potentially, therefore, the court

reviews compliance with article 2 in all cases in which the 'life' of the foetus is destroyed.

Similarly, it might be contended that, since article 15 of the Convention states that no derogation may be made from article 2, it would be preposterous for the court to find that article 2 is not absolute, or is subject to implied exceptions other than those exhaustively set out in the second paragraph thereof. This would militate in favour of holding that article 2 does not apply to the unborn child (as the unborn child is not one of the exceptions set out in the second paragraph). However, I am not persuaded by either of these two arguments. The non-derogation rule only prohibits states parties that derogate from the Convention in time of war or other public emergency, as they are entitled to do by article 15, from infringing article 2. However, quite clearly situations and exceptional circumstances of this kind are quite unrelated to the killing of an unborn child. More disconcerting from a logical perspective is an argument based on the actual wording of article 2. However, not only has the court already decided the point (as it indisputably did in *Boso's* case), article 2 cannot be conclusively construed as clearly prohibiting all voluntary terminations of pregnancy, if only because a number of contracting states have ratified the Convention without any apparent problem, despite already possessing legislation permitting voluntary termination in certain circumstances. Even more persuasive when it comes to an evolutive interpretation of article 2 is the fact that a large number of European countries passed legislation in the 1970s permitting the voluntary termination of pregnancy within a strict framework.

As regards the potential effects of finding article 2 applicable, it could perhaps be objected, conversely, that the present case can be distinguished from the voluntary termination of pregnancy cases and that the destruction of a foetus as a result of medical error, or any other negligent act or omission, is different from termination at the request of the mother in distress herself. In other words, those who, in the name of women's freedom of choice, defend the principle of voluntary termination of pregnancy might fear that such legislation would indirectly be at risk if article 2 was found to be applicable. It is true that the 'Garraud Amendment', which is mentioned in the judgment and was finally withdrawn from Parliament, was fiercely opposed by sections of French society, in particular (but not only) supporters of the Voluntary Termination of Pregnancy Act, precisely for this reason (as it was intended to create an offence of involuntary termination of pregnancy).

However, I do not believe that such fears are legitimately justified, if only because a woman who loses her unborn child against her wishes and sees her hopes of maternity dashed is in an entirely different situation from a woman resigned-albeit likewise in circumstances of suffering and bereavement-to ask

for her pregnancy to be brought to an end. In any event, it is not a judicial decision (on the applicability or otherwise of article 2 of the Convention), which will resolve this ethical debate; still less justify society's policy choices. In addition, since the *Vo v France* judgment does not require states to afford *criminal law* protection against the risk of the loss of the foetus (and on that I agree), it does not, in any event, plead in favour of making the involuntary termination of pregnancy a criminal offence.

In sum, I see no good legal reason or decisive policy consideration for not applying article 2 in the present case. On a general level, I believe (in company with many senior judicial bodies in Europe) that there is life before birth, within the meaning of article 2, that the law must therefore protect such life, and that if a national legislature considers that such protection cannot be absolute, then it should only derogate from it, particularly as regards the voluntary termination of pregnancy, within a regulated framework that limits the scope of the derogation. The actual circumstances of Mrs Vo's case made it all the more appropriate to find that article 2 was applicable: she was six months pregnant (contrast this—purely for illustration purposes—with the German Federal Constitutional Court's view that life begins after fourteen days gestation), there was every prospect that the foetus would be born viable and, lastly, the pregnancy was clearly ended by an act of negligence, against the applicant's wishes.

I have nothing further to add, since, with minor differences, I agree with what the judgment has to say in finding that there has been no violation of article 2.

(b) Separate Opinion of Judge Rozakis, Joined by Judges Caflisch, Fischbach, Lorenzen and Thomassen.

I have voted, together with the majority of the Grand Chamber, in favour of finding that there has been no violation of article 2 in the instant case. Yet, my approach differs in certain respects from that of the majority and I would therefore like to append to the judgment this separate opinion setting out the points on which my assessment of the law is at variance with that of the majority.

The court in this case correctly stresses that research into French domestic law shows that the nature and legal status of the embryo and/or the foetus are currently not defined in France and that the manner in which it is to be protected will ultimately be determined by very varied forces within French society (paragraph 83, *in fine*). It also stresses (and this was a forceful argument in the eyes of the court) that at European level there is no consensus on the nature and status of the embryo and/or foetus and, at best, 'it may be regarded as common ground between states that the embryo/foetus belongs to the

human race. The potentiality of that being and its capacity to become a person-enjoying protection under the civil law, moreover, in many states, such as France, in the context of inheritance and gifts, and also in the United Kingdom-require protection in the name of human dignity, without making it a "person" with the "right to life" for the purposes of article 2' (paragraph 84).

Despite these findings, with which I readily agree, the court refuses to draw the relevant conclusions, namely that in the present state of development of science, law and morals, both in France and across Europe, the right to life of the unborn child has yet to be secured. Even if one accepts that life begins before birth, that does not automatically and unconditionally confer on this form of human life a right to life equivalent to the corresponding right of a child after its birth. This does not mean that the unborn child does not enjoy any protection by human society, since-as the relevant legislation of European states, and European agreements and relevant documents show-the unborn life is already considered to be worthy of protection. But as I read the relevant legal instruments, this protection, though afforded to a being considered worthy of it, is, as stated above, distinct from that given to a child after birth, and far narrower in scope. It consequently transpires from the present stage of development of the law and morals in Europe that the life of the unborn child, although protected in some of its attributes, cannot be equated to post-natal life, and, therefore, does not enjoy a right in the sense of 'a right to life', as protected by article 2 of the Convention. Hence, there is a problem of applicability of article 2 in the circumstances of the case. Instead of reaching that unavoidable conclusion, as the very reasoning of the judgment dictated, the majority of the Grand Chamber opted for a neutral stance, declaring 'the court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of article 2 of the Convention' (paragraph 85).

What also seems problematic with the majority's reasoning is that, despite their obvious doubts or, at any rate, their reluctance to accept that article 2 was applicable in this case, the majority ended up abandoning their neutral stance and based their finding of no violation on the argument that the procedural guarantees inherent in the protection of article 2 had been satisfied in the circumstances of the case. By using the 'even assuming' formula as to the applicability of article 2, and by linking the life of the foetus to the life of the mother ('the life of the foetus was intimately connected with that of the mother and could be protected through her'-see paragraph 86), the majority has surreptitiously brought article 2 of the Convention to the fore of the case. Yet, it is obvious from the case law that reliance on the procedural guarantees of article 2 to determine whether or not there has been a violation presupposes the *prima facie* applicability of that article (and using the 'even

assuming' formula does not alter the position if, in the end, the only real ground for the court's findings is the hypothesis referred to in the formula); and in the circumstances of the case there was not even the remotest threat to the mother's right of life such as would justify bringing the procedural guarantees of article 2 of the Convention into play.

For the reasons explained above, I am unable to agree with the reasoning of the majority and conclude that, as matters presently stand, article 2 is inapplicable in this case.

(15) DISSENTING OPINION OF JUDGE RESS

(a) Translation

France's positive obligation to protect the unborn children against unintentional homicide, that is to say against negligent acts that could cause a child's death, can only be discharged if French law has effective procedures in place to prevent the recurrence of such acts. On this point, I am unable to agree with the opinion expressed by the majority that an action in damages in the administrative courts (on account of the hospital doctor's alleged negligence) afforded the unborn child adequate and effective protection against medical negligence. As Judge Rozakis, joined by Judges Bonello and Stráznická, pointed out in his dissenting opinion in the case of *Calvelli v Italy* [2002] ECHR 32967/96, an action in pecuniary and even non-pecuniary damages will not in all circumstances be apt to protect against the unintentional taking of life, especially in a case such as the present one in which a mother lost her child as a result of a doctor's negligence. Even though I accepted the outcome in the case of *Calvelli's* case, which was based on the fact that the applicants had agreed to compensation under a friendly settlement, criminal proceedings were commenced in that case (although they were not continued because prosecution of the offence became statute-barred).

It is not retribution that makes protection by the criminal law desirable, but deterrence. In general, it is through the criminal law that society most clearly and strictly conveys messages to its members and identifies values that are most in need of protection. Life, which is one of the values, if not the main value, protected by the Convention (Streletz, Kessler and Krenz v Germany [2001] ECHR 34044/96 at paragraph 92-94; and *McCann v UK* [1995] 21 EHRR 97 at paragraph 147), will in principle require the protection of the criminal law if it is to be adequately safeguarded and defended. Financial liability to pay compensation is only a secondary form of protection. In addition, hospitals and doctors are usually insured against such risks, so that the 'pressure' on them is reduced.

One might consider that imposing a disciplinary penalty on a doctor could be regarded as equivalent to imposing a criminal penalty in certain circumstances. Disciplinary measures were viewed as an alternative means of discouraging negligence in the case of *Calvelli v Italy* [2002] ECHR 32967/96 at paragraph 51. However, it is equally clear that, as unpleasant as the consequences may be professionally, a disciplinary penalty does not amount to general condemnation (*Unwerturteil*). Disciplinary penalties depend on conditions that are entirely specific to the profession concerned (the bodies being self-regulating) and in general do not afford the deterrence necessary to protect such an important value as life. Nevertheless, the question has to be asked whether in the present case a disciplinary penalty for such a serious error could have provided sufficient deterrence. Here, though, is where the problem lies, as the authorities at no stage brought disciplinary proceedings against the doctor. For an error as serious as that committed by Dr G such disciplinary proceedings accompanied by an adequate measure could at least have sent an appropriate signal to the medical profession to prevent the recurrence of such tragic events. I do not think it necessary to say that France requires criminal legislation. However, it does need to take strict disciplinary action in order to meet its obligation to afford effective protection of the life of the unborn child. In my opinion, therefore, there was no effective protection.

In order to reach that conclusion, it seems necessary to find out whether article 2 applies to the unborn child. I am prepared to accept that there may be differences in the level of protection afforded to an embryo and to a child after birth. Nevertheless, that does not justify the conclusion (at paragraph 85 of the judgment) that it is not possible to answer in the abstract the question whether the unborn child is a person for the purposes of article 2 of the Convention. All the court's case law and the commission's decisions (see paragraphs 75-80 of judgments) are based on the 'assuming that' argument (*in eventu*). Yet the failure to give a clear answer can no longer be justified by reasons of procedural economy. Nor can the problem of protecting the embryo through the Convention be solved solely through the protection of the mother's life. As this case illustrates, the embryo and the mother, as two separate 'human beings', need separate protection.

The Vienna Convention on the Law of Treaties article 31(1) requires treaties to be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose. The ordinary meaning can only be established from the text as a whole. Historically, lawyers have understood the notion of 'everyone' (*toute personne*) as including the human being before birth and, above all, the notion of 'life' as covering all human life commencing with conception, that is to say

from the moment an independent existence develops until it ends with death, birth being but a stage in that development.

The structure of article 2 and, above all the exceptions set out in paragraph 2 thereof, appear to indicate that persons are only entitled to protection thereunder once they have been born and that it is only after birth that they are regarded as having rights under the Convention. In view of the 'aim' of the Convention to provide extended protection, this does not appear to be a conclusive argument. Firstly, a foetus may enjoy protection, especially within the framework of article 8(2). (See *Odièvre v France* [2003] 1 FCR 621 at 645 paragraph 45). In addition, the decisions of the commission and the court contain indications that article 2 is applicable to the unborn child. In all the cases in which that issue has been considered, the commission and the court have developed a concept of an implied limitation or of a fair balance between the interests of society and the interests of the individual, that is to say the mother or the unborn child. Admittedly, these concepts were developed in connection with legislation on the voluntary, but not the involuntary, termination of pregnancy. However, it is clear that they would not have been necessary if the commission and the court had considered at the outset that article 2 could not apply to the unborn child. Even though the commission and the court have left the question open formally, such a legal structure proves that both institutions were inclined to adopt the ordinary meaning of 'human life' and 'everyone' rather than the other meaning.

Similarly, the practice of the contracting states, virtually all of which had constitutional problems with their laws on abortion (voluntary termination of pregnancy), clearly shows that the protection of life also extends in principle to the foetus. Specific laws on voluntary abortion would not have been necessary if the foetus did not have a life to protect and was fully dependent till birth on the unrestricted wishes of the pregnant mother. Nearly all the contracting states have had problems because, in principle, the protection of life under their constitutional law also extends to the prenatal stage.

It is obvious that the premise of the debate on genetic safeguards in a number of recent conventions and the prohibition on the reproductive cloning of 'human beings' in the Charter of Fundamental Rights of the European Union (article 3(2), final subparagraph) is that the protection of life extends to the initial phase of human life. The Convention, which was conceived as a living instrument to be interpreted in present-day conditions in society, must take such a development into account in order to confirm the 'ordinary meaning', in accordance with article 32 of the Vienna Convention.

Even if it is assumed that the ordinary meaning of human life in article 2 of the Convention is not entirely clear and can be interpreted in different ways, the obligation to protect human life requires more extensive protection,

particularly in view of the techniques available for genetic manipulation and the unlimited production of embryos for various purposes. The manner in which article 2 is interpreted must evolve in accordance with these developments and constraints and confront the real dangers now facing human life. Any restriction on such a dynamic interpretation must take into account the relationship between the life of a person who has been born and the unborn life, which means that protecting the foetus to the mother's detriment would be unacceptable.

The fact that various provisions of the Convention contain guarantees which by their nature cannot extend to the unborn cannot alter that position. If, by their very nature, the scope of such provisions can only extend to natural persons or legal entities, or to persons who have been born or are adults, that does not preclude the conclusion that other provisions such as the first sentence of article 2 incorporate protection for the lives of human beings in the initial stage of their development.

It should be noted that the present case is wholly unrelated to laws on the voluntary termination of pregnancy. That is a separate issue which is fundamentally different from interference, against the mother's wishes, in the life and welfare of her child. The present case concerns wrongdoing by a third party resulting in the loss of a foetus, if not the death of the mother, whereas voluntary abortion is solely concerned with the relationship between the mother and the child and the question of their protection by the state. Although holding that article 2 applies to human life before birth may have repercussions on the laws regulating the voluntary termination of pregnancy, that is not a reason for saying that article 2 is not applicable. Quite the opposite.

Furthermore, it is not necessary in the instant case to decide when life begins. It was noted that the 21-week old foetus was viable, although I believe that the notion of viability cannot limit the states' positive obligation to protect the unborn child against interference and negligence by doctors.

There can be no margin of appreciation on the issue of the applicability of article 2. A margin of appreciation may, in my opinion, exist to determine the measures that should be taken to discharge the positive obligation that arises because article 2 is applicable, but it is not possible to restrict the applicability of article 2 by reference to a margin of appreciation. The question of the interpretation or applicability of article 2 (an absolute right) cannot depend on a margin of appreciation. If article 2 is applicable, any margin of appreciation will be confined to the effect thereof.

Since I consider that article 2 applies to human beings even before they are born, an interpretation which seems to me to be consistent with the

approach of the Charter of Fundamental Rights of the European Union, and since France does not afford sufficient protection to the foetus against the negligent acts of third parties, I find that there has been a violation of article 2 of the Convention. As regards the specific measures necessary to discharge that positive obligation, that is a matter for the respondent state, which should either take strict disciplinary measures or afford the protection of the criminal law (against unintentional homicide).

(16) DISSENTING OPINION OF JUDGE MULARONI JOINED BY JUDGE STRÁZNICKÁ

(a) Translation

I am unable to concur with the majority's finding that there has been no violation of article 2 of the Convention because the applicant could have brought an action in negligence in the administrative courts for the damage caused by the hospital doctor (see paragraph 91 of the judgment). According to the majority, since the applicant did not bring such an action, there was no violation of article 2.

I agree with the majority that it is necessary to consider 'whether the legal protection afforded the applicant by France in respect of the loss of the unborn child she was carrying satisfied the procedural requirements inherent in article 2 of the Convention' (see paragraph 85 of the judgment) and that 'the first sentence of article 2, which ranks as one of the most fundamental provisions in the Convention and also enshrines one of the basic values of the democratic societies making up the Council of Europe (see *McCann v UK* [1995] 21 EHRR 97 at paragraph 147), requires the state not only to refrain from the 'intentional' taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see, among other authorities, *LCB v UK* [1998] 4 BHRC 447 at paragraph 36)' (see paragraph 88 of the judgment).

However, I come to entirely different conclusions.

I note that in December 1991, when the applicant and her partner lodged a criminal complaint with an application to be joined to the proceedings as civil parties for unintentional injury to the applicant entailing total unfitness for work for a period not exceeding three months and unintentional homicide of her child, the *Conseil d'Etat* had not yet abandoned its position that a hospital department could incur liability only in cases of gross negligence (see paragraph 57 of the judgment, the government's submissions).

It is true that, as the majority note, the applicant could have tried to bring an action in damages against the authorities before it became statute-barred. However, it seems to me that the court may be demanding too much of this

applicant when it is recalled that the position taken by the Court of Cassation in its judgment of 30 June 1999, and which it subsequently followed in its judgments of 29 June 2001 (sitting as a full court) and 25 June 2002 (see paragraph 29 of the judgment), was far from established, as witnessed by the court of appeal decisions to the contrary, the submissions of the advocates general at the Court of Cassation and, lastly, the almost universal criticism it attracted from legal commentators (see paragraph 31 of the judgment). Since it was doubtful that she would be successful in an action in the administrative courts, the applicant brought criminal proceedings under the only two provisions of the Criminal Code that were open to her. She told the court that she chose that course of action because a criminal investigation would aid in the task of establishing responsibility (see paragraph 50 of the judgment). That explanation is entirely logical: it is precisely what most victims of crime do in countries that offer a choice between proceedings in the criminal courts or in the civil or administrative courts.

It could be argued that the French legal system did not afford the applicant any 'effective' remedy when these sad events took place.

Nevertheless, let us assume that the applicant had a choice between criminal and administrative remedies. Since a victim cannot claim compensation for his or her damage twice over, it would to my mind be disproportionate to criticise the applicant for not having exercised both remedies simultaneously. It would also represent a departure from the court's case law.

Under the case law of the Convention institutions, where there is a choice of remedies open to the applicant, article 35 must be applied to reflect the practical realities of the applicant's position in order to ensure the effective protection of the rights and freedoms guaranteed by the Convention (*Allemeine Gold-und Silberscheideanstalt AG v UK* [1983] 32 DR 159). The applicant must have made normal use of domestic remedies which are likely to be effective and sufficient. When a remedy has been attempted, use of another remedy which has essentially the same objective is not required (*Wójcik v Poland* [1997] 90A DR 24; *Günaydin v Turkey* application number 27526/95 (25 April 2002, UR); *Anagnostopoulos v Greece* application number 54589/00 (3 April 2003, UR). Furthermore, the applicant is only required to have recourse to such remedies as are both available and sufficient, that is to say capable of providing redress for his or her complaints (*Airey v Ireland* [1979] 2 EHRR 305 at paragraph 19; *Deweert v Belgium* [1980] 2 EHRR 439 at paragraph 29).

I would also note that the amount at stake in the aforementioned *Anagnostopoulos v Greece* case was 15 000 drachmas (approximately 44 euros), whereas in the present case we are dealing with an unborn child.

The majority make a number of references to *Calvelli v Italy* [2002] ECHR 32967/96, in which the court stated (at paragraph 51): '[I]f the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy.' It added: 'In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged.'

I consider that the differences between the solutions afforded by the two domestic legal systems must outweigh the similarities. In *Calvelli's* case, the applicants—the father and mother of a newborn child who died two days after birth—had brought criminal proceedings which ended when the offence of involuntary manslaughter with which the obstetrician was charged became statute-barred. However, the applicants were able to summon the doctor to appear in the civil courts after he was convicted at first instance in the criminal courts almost seven years after the death of the child and, with the civil proceedings still pending, they reached a settlement with the doctor's and clinic's insurers in respect of the damage they had sustained. The court recognised that the Italian legal system afforded the applicants an effective alternative to criminal proceedings (*Calvelli's* case at paragraphs 54–55) that enabled the respondent state to discharge its positive obligations under article 2 of the Convention. In my opinion, the same cannot be said of its French counterpart in the present case.

I must confess that, had I been sitting in *Calvelli's* case, I would undoubtedly have concurred with the partly dissenting opinion of Judges Rozakis, Bonello and Stráznická. However, even if I had agreed with the majority, it does not seem to me that their conclusion in *Calvelli's* case can be transposed to the present case, in which the limitation period for an action in the administrative courts, which at the time was four years from the date of stabilisation of the damage, had expired by the time the criminal proceedings ended. The applicant received no reparation for her loss, not even for the offence of unintentionally causing injuries, for which the doctor was given an amnesty by the law of 3 August 1995.

I conclude that, in the light of the loss of the child she was carrying, the legal protection France afforded the applicant did not satisfy the procedural requirements inherent in article 2 of the Convention.

Obviously, since I do not accept the reasoning that led the majority to hold that there has been no violation of article 2 on procedural grounds and that it is therefore unnecessary to determine whether article 2 is applicable, I must explain why I consider that that provision is applicable and has been violated.

Up till now, while the Convention institutions have refrained from deciding whether or not article 2 applies to unborn children (see paragraphs 75-80 of the judgment), they have not excluded the possibility that the foetus may enjoy a certain protection under article 2, first sentence (*H v Norway* [1992] 73 DR 155 at 167; *Boso v Italy* application number 50490/99 (5 September 1992, UR)).

Firstly, I think it necessary to bear in mind that the task of the national and international judge is not always easy, especially when a text may be construed in ways that are diametrically opposed.

The *travaux préparatoires* on the Convention are silent on the scope of the words 'everyone' and 'life' and as to whether article 2 is applicable prior to birth.

Yet since the 1950s, considerable advances have been made in science, biology and medicine, including at the prenatal stage.

The political community is engaged at both national and international level in trying to identify the most suitable means of protecting, even prenatally, human rights and the dignity of the human being against certain biological and medical applications.

I consider that it is not possible to ignore the major debate that has taken place within national parliaments in recent years on the subject of bioethics and the desirability of introducing or reforming legislation on medically assisted procreation and prenatal diagnosis, in order to reinforce guarantees, prohibit techniques such as the reproductive cloning of human beings and provide a strict framework for techniques with a proven medical interest.

The aim of the Convention on Human Rights and Biomedicine, which was opened for signature on 4 April 1997 in Oviedo and entered into force on 1 December 1999, is to protect the dignity and identity of human beings and to guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine. It protects the dignity of everyone, including the unborn, and its main concern is to ensure that no research or intervention may be carried out that would undermine respect for the dignity and identity of the human being. Although this Convention is very recent, it does not define the terms 'everyone' and 'human being' either, although it affirms their

primacy in article 2 in these terms: 'The interests and welfare of the human being shall prevail over the sole interests of society or science.' As to the problem of defining the term 'everyone', the Explanatory Report produced by the Directorate General of Legal Affairs at the Council Europe states, at paragraph 18: 'In the absence of a unanimous agreement on the definition of these terms among member States of the Council of Europe, it was decided to allow domestic law to define them for the purposes of the application of the present Convention.'

Furthermore, I note that this Convention unquestionably contains provisions on the prenatal phase (see, for instance, Ch IV-Human Genome). Requests may be made to the European Court of Human Rights under article 29 of the Convention for advisory opinions on its interpretation. The contracting states did not impose any restriction on the scope of such referrals confining the court's jurisdiction to questions arising postnatally.

Although the texts are either silent or full of cross-references, the applicant is nevertheless entitled to an answer.

Secondly, I would stress that the court must deliver a decision on the concrete case before it. The application concerns the termination of a pregnancy as a result of medical negligence that caused the loss of a foetus aged between 20 and 24 weeks, against the mother's wishes.

In that connection, I consider that one should not overlook the fact that the foetus in the instant case was almost as old as foetuses that have survived and that scientific advances now make it possible to know virtually everything about a foetus of that age: its weight, sex, exact measurements, and whether it has any deformities or problems. Although it does not yet have any independent existence from that of its mother (though having said that, in the first years of its life, a child cannot survive alone without someone to look after it either) I believe that it is a being a separate from its mother.

Although legal personality is only acquired at birth, this does not to my mind mean that there must be no recognition or protection of 'everyone's right to life' before birth. Indeed, this seems to me to be a principle that is shared by all the member states of the Council of Europe, as domestic legislation permitting the voluntary termination of pregnancy would not have been necessary if the foetus was not regarded as having a life that should be protected. Abortion therefore constitutes an exception to the rule that the right to life should be protected, even before birth.

In any event, this case is wholly unconcerned with the states' domestic abortion laws, which have long been the subject matter of applications to the Convention institutions and have been found to be consistent with the Convention (see paragraphs 75-80 of the judgment).

I consider that, as with other Convention provisions, article 2 must be interpreted in an evolutive manner so that the great dangers currently facing human life can be confronted. This is made necessary by the potential that exists for genetic manipulation and the risk that scientific results will be used for a purpose that undermines the dignity and identity of the human being. The court has, moreover, often stated that the Convention is a living instrument, to be interpreted in the light of present-day conditions (see, among other authorities, *Tyrer v UK* [1978] 2 EHRR 1 at paragraph 31; *Loizidou v Turkey* [1995] 20 EHRR 99 at paragraph 71; *Mazurek v France* [2000] ECHR 34406/97 at paragraph 49).

I therefore find that article 2 the Convention is applicable in the present case and has been violated, as the right to life has not been protected by the law of the respondent state.

For the appellant:

Mr Le Griel

For the respondent:

Mr F Alabrune

WALDERMAR V REPUBLIC

NO. 15 OF 1991; [1991] LLR 92 (HCT)

[1] Constitutional Law – Fundamental Rights and Freedoms – Rights to personal Liberty – Whether provisions of the criminal procedure code allowing Director of Public Prosecution to certify that accused persons are not entitled to bail is unconstitutional.

Editor's Summary

The applicants were facing a trial for indecent assault and had been refused bail on the ground that safety of the members of public will be prejudiced pursuant to a DPP's certificate as provided for under the Criminal Procedure Code.

The issue for determination before court was the constitutionality of section 148(4) of Criminal Procedure Code and DPP's certificate filed on the basis of the same.

Held – An application of a similar nature is pending before Court of Appeal and the court would await its outcome.

No cases referred to in ruling

Ruling

KYANDO J: I, Ernest Lazaro Kembela Mwipopo, The Director of Public Prosecutions in the United Republic in terms of section 148(4) of the Criminal Procedure Act as amended by Act number 10 of 1989 do hereby certify that they were charged with the offence of indecent assault c/s 135(1) of the Penal Code be Not admitted to bail pending trial as it is likely that the safety of the Republic would thereby be prejudiced.

Section 148(4) of Criminal Procedure Act, by virtue of which Director of Public Prosecutions issued his certificate provides:

- 148(4) notwithstanding anything in this section contained, no police officer or court shall, after a person is arrested and while he is awaiting trial or appeal, admit that person to bail if the Director of Public Prosecutions certifies in writing that it is likely that the safety or interests of the Republic would thereby be prejudiced.

There is also section 148(4A) which provides:

- 148(4A) A certificate issued by the Director of Public Prosecutions under this section shall take effect from the date it is filed in court or notified to the officer in charge of a

police station, and shall remain in effect until the proceedings concerned are concluded or the Director of Public Prosecutions withdraws it.

At the hearing of the applicant's application before me Mr *Teemba* objected to bail, relying on the DPP's certificate and the provisions of the law reproduced above. Mr *Bwahama* countered by challenging the validity of the provisions in section 148(4) Criminal Procedure Act. He contended that these provisions are invalid *vis a vis* the Constitution of the United Republic of Tanzania. He said they have been so held and struck down in the now celebrated case of *Daudi s/o Pete v Republic* miscellaneous criminal cause number 80 of 1989 (UR) (Mwanza Registry) (UR). He prayed that I follow that case in this application and declare section 148(4) Criminal Procedure Act null and void for being in conflict with the Constitution and disregard the Certificate filed by the Director of Public Prosecutions.

Mr *Teemba* replied by stating that whether a piece of legislation is in conflict with the Constitution or not is a matter for parliament; he said it is Parliament which has the power to declare a statute null and void and not the courts. He submitted therefore that I had no power to pronounce on the validity or otherwise of the provisions of section 148(4) Criminal Procedure Act. As to the case of *Daudi s/o Pete v Republic* (*supra*) he pointed out that the Republic has appealed against the decision in that case and the matter is now in the Court of Appeal, the highest and final court in Tanzania, awaiting judgment.

I think with utmost respect, Mr *Teemba* is mistaken in the view he holds, i.e. that this Court has no power to declare a statute null and void and that it is only Parliament which has such power. For in all countries with written Constitutions, as is the case with Tanzania, the Constitution is supreme. It is the supreme or fundamental law of the land. If therefore any other legislation is inconsistent with the Constitution, that other legislation is, to the extent of the inconsistency, void. The responsibility for declaring such legislation void lies with the Courts of Law. This is elementary and I hardly need to refer to any authorities. It suffices to point out that the principle was incorporated e.g. in the Uganda Constitution of 1966 (see articles 1 and 87) and the Lesotho Constitution of 1966 (see article 2). See also article 30(3), (4) of the Constitution of the United Republic of Tanzania 1977.

It is elementary, too that a decision of one judge of this Court (the High Court) does not bind another or other judges of this same Court. It is only decisions of the Court of Appeal which bind this Court. So, though it is good policy that decisions of the same court should be consistent and unconflicting, I am as a matter of principle, not bound to follow the decision in the case of *Daudi s/o Pete v Republic* which was relied on by Mr *Bwahama* in attacking the validity of the Director of Public Prosecutions certificate and section 148(4) Criminal Procedure Acts on which it (the certificate) is based. That decision was rendered by a judge of this Court. And to my knowledge, since that decision was rendered it has stood alone; no other judge in this court has followed or supported it. In the case of *Charles*

Mwakalinga v Republic which Mr Bwahama also referred to, Bahati J did not seek to follow the decision in the *Daudi s/o Pete* case. All that Bahati J said in that case was that the District Court was bound by the decision in *Pete's Case* and acted correctly in feeling it was bound. This was, of course, based on the cardinal principle that decisions of this court bind courts subordinate to it. Bahati J did not as stated already, say that he was agreeing with the decision in *Pete's case* and therefore that the lower court applied it correctly in terms of the merits of the decision in that case (*Pete's case*).

Mr *Bwahama* made several other points in his submissions both oral and written in support of this application. In my view, however, and as Mr *Teemba* rightly pointed out, the crucial point at this stage in the matter is the validity or otherwise of the provisions of section 148(4) Criminal Procedure Act and the Director of Public Prosecutor Certificate filed on the basis of them, i.e. the provisions. Fortunately, and as Mr *Teemba* again rightly pointed out, the case of *Daudi s/o Pete v Republic* on which Mr *Bwahama* relied in challenging the validity of the provisions and the certificate, is presently before the Court of Appeal for appeal purposes. To my knowledge the appeal has been heard already and it is only the judgment which is pending delivery. The very issue of the validity or otherwise of section 148(4) Criminal Procedure Act is one of the issues for determination in that appeal. It would then, to my mind be prudent and a matter of good sense to await the determination on the issue by Court of Appeal. I hold so.

In the meantime, the Director of Public Prosecution's Certificate issued under the provisions of section 148(4) Criminal Procedure Act holds sway and operates to bar the release of the applicants on bail.

For the appellants:

Mr Bwahama

For the respondent:

Mr Teemba

WALTER AND OTHERS V REPUBLIC

NO. 62 OF 1991; [1991] LLR 91(HCT)

[1] Constitutional Law – Fundamental Rights and Freedoms – Rights to personal Liberty – Whether provisions of the Criminal Procedure Code allowing Director of Public Prosecutions to certify that accused persons are not entitled to bail is unconstitutional.

Editor's Summary

The applicants were facing a trial for indecent assault and had been refused bail on the ground that safety of the members of public will be prejudiced pursuant to a DPP's certificate as provided for under the Criminal Procedure Code.

The issue for determination before court was the constitutionality of section 148(4) of criminal procedure code and DPP's certificate filed on the basis of the same.

Held – An application of a similar nature is pending before Court of Appeal and the court would await its outcome.

No cases referred to in ruling

Ruling

KYANDO J: This is an application for bail-pending trial. The applicants, Freitag Walter, Huber Waldermar, Maurice Boutinon and Fritz Koch, who are indicated in the District Court of Ilala, at Kisutu. The charge contains two counts of indecent assault. The first count alleges that the applicants, on or about the 1 April 1991, at 4:00 hours, at Mikocheni 'B', in Dar-es-Salaam, did unlawfully and indecently assault one Mariam Benson "by stripping her naked and facilitating their male dog to have sexual intercourse to the said Mariam Benson". The second count alleges assault by the applicants by photographing the scene alleged in the first count.

When they were brought before the Court below all the applicants pleaded by denying the truth of the allegations contained in the charge. Then they applied to be released on bail pending trial. The application was refused. In his ruling refusing bail dated 11 April 1991 the learned Magistrate who heard the application stated:

"As I said two days ago, this offence is quite unusual. The DSM public has not forgotten it. That is why there are increased security measures; that is why the

accused had to be brought through my private entrance this afternoon. For their own safety, I remand them in custody.

Following the above ruling they have now filed this application in this Court. They are all represented by Mr *Bwahama*, learned advocate. Mr *Teemba*, Principal State Attorney, appeared on behalf of the Director for public prosecutions at the hearing of the application in this Court.

Soon after the application was filed here and soon after papers relating to it were served on the Director of Public Prosecutions (DPP), he (the DPP) filed a certificate under section 148(4) of the Criminal Procedure Act, 1985 (CPA), as amended. The Certificate States that after a person is arrested and while he is awaiting trial or appeal, admit that person to bail if the Director of Public Prosecutions certifies in writing that it is likely that the safety or interests of the republic would thereby be prejudiced.”

For the appellant:

Mr Bwahama

For the respondent:

Mr Teemba

WAMWERE V ATTORNEY GENERAL

NO. 574 OF 1990; [1990] LLR 5980 (HCK)

[1] Constitutional Law – Fundamental rights and freedoms – Right to personal liberty – Nature of such right and whether Absolute – Right to be presumed innocent until proven guilty – Whether comments by politician about arrest and trial is prejudicial to enjoyment of the right to be presumed innocent.

Editor's Summary

The applicant was facing a treason charge and was being held in prison pending the trial of the matter. He has now moved to court under section 84(1) and (2) of the Constitution for several declarations.

The issues for determination were:

- (1) Whether the applicant's right to personal liberty under section 72(1) of the Constitution has been contravened and violated by Kenya security officers in view of the fact that he was forcefully kidnapped in a neighbouring country and repatriated to be incarcerated.
- (2) Whether the applicant's right to be protected from degrading and inhuman treatment under section 74(1) of the Constitution were violated when he was kidnapped and tortured with a view to extracting confession.
- (3) Whether the applicant's right to be presumed innocent under section 77(2) of the Constitution has been violated by subjecting him to public condemnation and denunciation.

Held – The Right to personal Liberty as enshrined in the Constitution has nothing to do with manner of arrest and neither is the protection absolute. The enjoyment of the right is subject to respect for the rights and freedoms of others and for the public interest.

Lawful deprivation to personal liberty is provided for in the Constitution.

The right to be presumed innocent is a right accorded to a person who is charged with a criminal offence and is not operative outside the criminal process.

Cases referred to in judgment

("A" means adopted; "AL" means allowed; "AP" means applied; "APP" means approved; "C" means considered; "D" means distinguished; "DA" means

disapproved; “**DT**” means doubted; “**E**” means explained; “**F**” means followed; “**O**” means overruled)

East Africa

Anarita Karimi Njeru v Republic [1979] KLR 154

Kinyori s/o Karuditu v Reginam (1956) 23 EACA 480

Mutunga v Republic [1986] KLR 167

Munyoki Mutunga v Republic (Nairobi miscellaneous criminal application number 101 of 1982) (UR)

United Kingdom

Woolmington v DPP [1935] AC 462; [1935] All ER Rep 1; 104 LJ KB 433; 153 LT 232

Judgment

MBALUTO J: The applicant faces a treason charge and is being held in prison pending the completion of committal documents relating to the charge.

He has moved this court under section 84(1) and (2) of the Constitution for several declarations that certain of his rights protected by the Constitution have been violated and contravened. He seeks other orders for the termination and discontinuance of the intended prosecution, for his release from prison and for payment of damages and compensation for the violation and contraventions allegedly committed.

This application, in which the Attorney General is named as the respondent, is supported by a lengthy 131 page affidavit sworn on 17 December 1990 by the applicant. Annexed to the applicant’s affidavit sworn earlier on 24 October 1990 and 12 November 1990 by his learned counsel Mr *Shamalla*. It is evident from their contents that the two affidavits by Mr *Shamalla* were sworn in connection with another application in the criminal case facing the applicant in the Chief Magistrate’s Court.

Over a half of the applicant’s affidavit (particularly paragraphs 1 to 72 thereof) contains no more than the applicant’s biographical data which in our view has nothing to do with this application and is wholly irrelevant to the issues we have to decide.

Moreover, there are in the affidavit a mass of inadmissible hearsay material which offend the provisions of Order XVIII of the Civil Procedure Rules. We do not, however, intend to undertake in this judgment the arduous task of going through the entire affidavit to determine which parts of it are proper and which are inadmissible because we think the application can be disposed of without recourse to that procedure.

The relevant parts of the applicant's affidavit show the manner in which the provisions of the Constitution guaranteeing the applicant's fundamental rights are alleged to have been contravened in relation to him. No replying affidavit has been filed on behalf of the respondent and so most of these statements of fact remain unchallenged. However, we have perused the record of the Chief Magistrate's criminal case number 5167 of 1990 from which this application arises and have seen that the respondent's case is that the applicant was neither arrested where he claims he was nor in the manner he alleges. It also emerges from the case file, and this is not disputed, that the applicant is being held in lawful custody on a charge of treason contrary to section 40(1)(a)(iii) of the Penal Code the offence being one of those which by virtue of section 123 of the Criminal Procedure Code are not bailable.

On the commencement of the hearing of this application before us, Mr *Etyang*, representing the respondent raised a preliminary objection to the effect that the application was misconceived and would be prejudicial to not only the applicant, but also the respondent. He further submitted that the application was calculated to defeat the criminal process. In his argument Mr *Etyang* referred to several sections of the Constitution which he said supported the points he was making.

After careful consideration of the matter we overruled the preliminary objection, not because we thought the submissions made by Mr *Etyang* were devoid of substance but rather because, in our view, what he put forward as a preliminary objection was in effect the respondent's answer to the application. In the event, we preferred to hear the applicant on the matter before listening to the respondent's answer thereto.

The applicant in the first prayer asks for a declaration that his:

"Right to personal liberty under section 72(1) of the Constitution was contravened and violated by the Kenya Security officers. In that the applicant having fled Kenya to avoid political persecution was forcefully and illegally kidnapped in a neighbouring country under abnormal circumstances and against his will he was repatriated to Kenya before being incarcerated."

This section of the Constitution alleged to have been contravened is 72(1), which is as follows:

"No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases:

- (e) Upon reasonable suspicion of having committed, under or being about to commit a criminal offence under the law of Kenya."

A careful reading of the above section shows that the fundamental right protected by the Constitution is that of personal liberty. The section has

nothing to do with such things as the matter and arrest is effected or where or when an arrest can be made. It also does not concern itself with extradition or the manner security officers are dressed when carrying out their duties. Neither is the protection provided by section 72(1) absolute for section 70 of the Constitution, which is the opening of the chapter (Chapter V) dealing with the protection of fundamental rights and freedoms of the individual in the Constitution, expressly provides that the enjoyment of those rights is:

“Subject to respect for the rights and freedoms of others and for the public interest.”

In considering the limitations on the protection of the fundamental rights stated above, we think the words of Sachdeva J in the case of *Munyoki Mutunga v Republic* (Nairobi miscellaneous criminal application number 101 of 1982) (UR), are apt. He stated:

“It is worth emphasizing that section 70 of the Constitution, with which the Chapter V begins, makes such rights subject to respect for the rights and freedoms of others and for the public interest and again, subject to limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest it cannot be stressed too often that such rights exist and are enforceable, only where law and order prevails. Once peace and stability disappear such rights also go overboard without a whimper.”

From the nature of the Criminal charge facing the applicant in the Chief Magistrate’s Court criminal case number 5167 of 1990 and the overt acts filed therein, it is clear, though as aforesaid no replying affidavit has been forthcoming from the respondent, that the case for the respondent is that the applicant is being lawfully deprived of his right to personal liberty by virtue of the provisions of section 72(1)(e) of the Constitution because he is reasonably suspected of having committed a criminal offence under the law of Kenya i.e an offence under section 40(1)(a) (iii) of the Penal Code.

Despite the above position which to us appeared as clear as anything can be, we were dismayed by the posture adopted by the applicant’s learned counsel. Instead of attempting to demonstrate in what manner section 72(1) as read with paragraph (e) thereof had been contravened, he appeared to be much more pre-occupied with the alleged kidnapping of the applicant from a neighbouring country. He was also unhappy that the usual extradition procedures were not followed and that the security personnel who allegedly arrested the applicant were hooded. When we informed him that his submissions were irrelevant to the issue we had to decide and that the Constitution did not concern itself with the matters he was concentrating on, he appeared to have suddenly run out of ideas and promptly terminated his

submissions on the point by stating that if that was the Court's view, he was withdrawing the prayer. Even the purported withdrawal of the prayer was typically ambivalent because on being told by the Court that he was in effect abandoning the declaration sought in prayer number 1, Mr *Shamalla* retorted that he was doing no such thing insisting that he was only withdrawing it. We were unable to see the difference.

Our view of the matter is that the fundamental right protected by section 72 of the Constitution is that of personal liberty. This protection is subject to several limitations, one of which is that contained in paragraph (e) of the section. The section does not deal with the matters urged upon us by Mr *Shamalla*.

Accordingly in our view no basis has been established for the declaration sought in prayer number 1 of the motion.

In the second prayer the applicant seeks a declaration that his:

"Right not to be subjected to torture or inhuman or degrading punishment or other inhuman treatment under section 74(1) of the Constitution has been violated by the Kenya Security and Police officers. When they kidnapped (him) and tortured him with a view of extracting confessions and subjected the applicant to most inhuman treatment."

Particulars and details of the alleged torture and inhuman treatment are given in the applicant's affidavit. Since the alleged torture is said to have been inflicted with a view to extracting confessions from the applicant, these matters will inevitably arise in the trial of the applicant.

As quite properly stated by Mr *Etyang*, they will be triable issues in the trial. That being the case the question that arises is whether it is in the interest of the applicant or indeed anyone else that this court should make findings on such issues. Our view is that it is not. Even the rules of criminal procedure of this country do not countenance the disclosure of the fact that an accused person has made an extra judicial statement where, (as will eventually happen in the applicant's trial) the admissibility of the statement is challenged.

In a trial by assessors where the defence desires to dispute the admission of any extra judicial statement, reference in the presence of the assessors to an extra judicial statement alleged to have been made by the accused person or even to the allegation that such statement as made is not permissible, unless and until the statement has been ruled admissible (see *Kinyori s/o Karuditu v R* (1956) 23 EACA 480).

Because of the allegations made in this application and the nature of the submissions made by Mr *Shamalla* we fear that any assessor who has followed the proceedings of this case in the media will not be unaware of these matters.

It is on record that we made every attempt to restrain Mr *Shamalla* from making some of the statements he made during his submissions as we felt some of them were not in the interests of the applicant, but he insisted on his client's right to complain about the alleged violations of the Constitution and in those circumstances there was nothing we could properly do to stop him.

We are unable to understand why an advocate who has some knowledge of the criminal law and procedure, even if such knowledge is of the most elementary nature, would deliberately take a course of action which is potentially prejudicial to his client's possible defence, in a case as serious as the one the applicant faces.

The other point we wish to make about the allegations of torture and inhuman treatment is that we do not think we have before us sufficient material on the basis of which we can make a proper finding one way or other regarding the issues. The only evidence we have is that contained in the affidavit of the applicant. As we said earlier the affidavit is full of inadmissible material. The evidence contained in it remains untested by cross-examination. It is therefore hardly the type of evidence that can form the basis for a conclusive finding on issues as weighty as the ones before us.

No useful purpose will therefore be served by an expression of our views on these matters before the actual trial of the applicant. In any event, we think any views we may express on the issues raised by the declaration sought in prayer number 2 may prejudice a fair trial of the applicant. For these reasons we choose not to make any findings on the allegations made in support of declaration.

In the third prayer the applicant seeks a declaration that his right to be presumed innocent until proved guilty which said right is guaranteed by section 77(2)(a) of the Constitution has been and is being contravened and violated by:

- (a) Subjecting him to prejudicial public condemnation and denunciation long before trial conviction.
- (b) Denouncing and condemning him thereby creating bias against him and thus making a fair hearing by an impartial court impossible.

In support of this part of his application, the applicant has annexed to his affidavit a huge bundle of photocopies of newspaper cuttings which show that the applicant's complaint arises from publication by newspapers of statements issued by public figures immediately after the announcement by the government of his arrest and the claim by the government that he was attempting to overthrow the government by unlawful means. That the statements condemn and denounce the applicant cannot be gainsaid.

There is no doubt that the Constitution section 77(1) require that the account used by that person be afforded a fair hearing within a reasonable time and section 77(2) that every person who is charged with a criminal offence be presumed innocent until he is proved or pleads guilty. Indeed that basic fundamental right and freedom of the individual is the basis of the principle in criminal law that with few exceptions the legal burden of proof lies upon the prosecution throughout the trial and does not shift to the accused (see to *Woolington v DPP* [1935] AC 462 481 and 482).

(See also section 306 of the Criminal Procedure Code). We must however point out that the right is accorded a person who is charged with a criminal offence and is not operative outside the criminal process. Quite clearly therefore the entity that is required to presume the accused person innocent must be the court trying him. It cannot be another entity and it certainly cannot be members of the public or indeed public officials.

We therefore think that there is a misunderstanding on the part of the applicant and his counsel of the nature of the principle involved. There cannot be a valid complaint at this stage that the Court has violated the right of the applicant to be presumed innocent. We say this because the trial of the applicant has not even commenced. It is therefore premature and speculative to complain about an alleged breach of the Constitution and lack of impartiality at this stage of the matter. However, if the complaints stem from fear that when the actual trial starts the court may be influenced by the public pronouncements that have been made about the applicant, our answer to this is that the High Court is manned by experienced and competent judges who know how to distinguish relevant facts from the irrelevant and the extraneous and who in accordance with their oath of office execute their functions without fear or favour. Having said so, we however feel constrained, to state that observations and comments made publically in connection with pending or imminent court proceedings may subject the makers thereof to serious consequences under the law.

We are, after careful consideration, satisfied that the condemnation and denouncement will not in anyway influence the trial of the applicant. We also think that we can assure the applicant that his trial will be fair and impartial, as always is the case, in the High Court. The complaints have no merit and are hereby rejected.

The alleged contraventions and violations of section 77(2)(e) of the Constitution alleged to be the foundation for the declaration sought in prayer number 4(a) and (b) related to complaints about administrative arrangements in the Prisons Department. The applicant mentions what he refers to as the unreasonable and illegal requirement by the Attorney General that the applicant's lawyer must seek prior clearance before seeing the applicant in prison; he further

claims that his transfer from Kamiti to Naivasha was done in a clandestine manner without following prison formalities and at a time when he was about to meet his lawyer.

As we have already observed these complaints are about administrative matters and do not raise constitutional issues. Moreover, bearing in mind the seriousness and sensitive nature of the charge facing the applicant, we cannot say that the transfer of the applicant from Kamiti to Naivasha or the requirement for prior clearance before the applicant's lawyer could be allowed to see him were breaches of any rules or regulations. We are however certain there was no violation of any Constitutional provisions with regard to those requirements. Consequently no basis has been established for the declaration sought in those two paragraphs of prayer number 4.

The declaration sought in paragraphs 4(c) and 4(d) were subject of an application by the applicant before the Principal Magistrate (Mr O Githinji). He considered the applicant's complaints and rejected them. No appeal was lodged against the learned Principal Magistrate's decision. In the event the decision of this Court in the case of *Anarita Karimi Njeru v Republic* [1979] KLR 154 applies. By raising the matters before the Principal Magistrate the applicant had availed himself of "other action" available to him within the meaning of section 84(1) of the Constitution and the Court should not be asked to adjudicate more than once on the same question.

The applicant alleges in prayer number 5 that his right to defend himself before the Court by a legal representation of his own choice under section 77(2) of the Constitution has been contravened by the authorities refusal to permit a lawyer of his choice to conduct and or lead his defence.

It should be noted that section 77(2) of the Constitution does not refer to a lawyer but to legal representative and obviously the term legal representative does not mean everyone who may pose as such. It must mean a person who is qualified as an advocate and has been duly admitted as such under the Advocates Act. We are aware that the Attorney General can, in his absolute discretion, admit a foreign advocate for the purpose of a specified matter (see section 11 of the Advocates Act) and we also note that the applicant's counsel did apply on 2 November 1990 for a QC from Britain to be admitted under section 11 of the advocates. The Attorney General's reply dated 19 December 1990 is as follows:

"I have considered your application and found that the case against your client is a straightforward case which can be handled without the assistance of a British Queen's Counsel. Accordingly, I refuse to grant the admission as requested."

In his submissions before us Mr *Shamalla* claimed that the Attorney General had failed to exercise in accordance with the law or at all, the discretion conferred upon him by section 11 of the Advocates Act, the argument underlying this complaint being that he (the Attorney-General) was, incapable of exercising the discretion by

reason of a statement made earlier in connection with the question of allowing a foreign lawyer into the country to defend the applicant. In the letter quoted above we however note that the Attorney-General stated that he had considered the matter and had decided to 'refuse' to grant the admission requested.' Mr *Shamalla's* assertions suggest that the statement contained in the Attorney-General's letter is not true. Those assertions are not supported by any fact. Consequently in the face of the clear and straightforward statement from the Attorney-General regarding the exercise of his discretion under section 11 of the Advocates Acts, we are unable to accept Mr *Shamalla's* bare assertions. In fact we regard them as not only speculative but also as indicative of the mischievous submissions that characterized his presentation of the applicant's case before us.

"For these reasons there is no substance in the complaints raised with regard to the declaration sought in prayer number 5 and it must be refused."

Finally we wish to point out that not every alleged infringement of a rule, regulation or law calls for a constitutional court. We say so because of late, a tendency has developed amongst practicing advocates, particularly these with a constitutional bias, whereby every action against the government is treated as a constitutional matter, sometimes without any regard for the interest of their clients. To give one example, quite recently a member of this bench when dealing with an appeal under section 29 of the Land Acquisition Act, had to go to considerable trouble to convince one of this group of so called 'Constitutional experts' that the appellants were not really interested in any constitutional issue but in the determination of the amount of compensation due to them. The appeal involved a group of rural folk whose farms had been compulsorily acquired by the government for a major public water project and it was clear from the perplexed expressions on their faces that, as the arguments about the constitutionality of the acquisition raged, they did not have the foggiest idea of what was going on. It was clear that their counsel's attraction for an academic argument overrode his duty to them as their counsel. That must have delayed payment of their compensation.

We conclude this matter by observing that as we listened to the submissions of the two counsel for the applicant we got the impression that some of the statements made in court were not really intended for us but were calculated to achieve other objectives unconnected and unrelated to the matters before the Court. We regret that very much because we regard it as one of the worst abuses of the court process. Furthermore, although some of the utterances by Mr *Shamalla* and Mr Kathurima were clearly contemptuous we refrained from taking any action against either of them because we did not wish to complicate matters in this particular case. We also did not wish to take any action that would give the applicant's counsel any excuse for accusing the court of unfairness or lack of impartiality. In the event we did not succeed and both counsel continued with their combative and sometimes contemptuous conduct up to the end of their submissions. That again is a matter to

be regretted because as officers of this court advocates are expected to conduct themselves properly and with some degree of decorum in court. That was singularly lacking on the part of applicant's counsel.

In the instant case it is clear that several of the matters raised by the applicant as constitutional issues have nothing to do with the fundamental rights and freedoms protected in Chapter V by the Constitution and are certainly not the type of matters the enforcement of which is envisaged by section 84(1) and (2) of the Constitution. For instance the question of the applicant's alleged kidnapping from a neighbouring country or the alleged failure to follow normal extradition procedures are not covered by any specific provision of the Constitution. Similarly, as we have shown above, the matters complained of in prayer number 3 i.e. the public condemnation and denunciation of the applicant can hardly be said to be in any way connected with the requirements of section 77(2)(a) under which an accused person is to be presumed innocent until he is proved or has pleaded guilty. The same points can be made regarding the complaints in prayers numbers 4 and 5 which if anything raise administrative issues which should have been dealt with as such. In this respect we must observe that there is nothing constitutional about the Attorney General's alleged failure and/or refusal to exercise his powers under section 11 of the Advocates Act; if any issue arises therefore, it would be an administrative law issue rather than a constitutional issue.

In our view, the fact that all these matters have been put forward as constitutional issues show that no serious thought was given to the requisite points of law when this application was being prepared.

The upshot of the matter is that we are not satisfied that the applicant has established any basis for the declarations he seeks in prayers 1 to 5.

Further, since the orders sought in prayers 6 to 8 naturally flow from the preceding prayers, it follows that they also must fail.

For the above reasons the application is dismissed with costs.

For the appellant:

Mr Shamalla and Mr Kathurima

For the respondent:

Mr Etyang

W'NJUGUNA V REPUBLIC

NO. 710 OF 2002; [2002] LLR 5985 (HCK)

[1] Constitutional Law – Fundamental Rights and Freedoms – Power of court to grant remedy in anticipation of violation of Fundamental rights and freedoms – Whether such power includes grant of anticipatory bail.

Editor's Summary

The applicants approached the court by way of a constitutional reference for order that a declaration be made that:

- (i) The applicant's rights have been contravened by way of arbitrary search.
- (ii) Remedy of anticipatory bail or bail pending arrest and charge is constitutionally provided for under Chapter 5 of the Constitution.

The brief facts were that the applicant was in a relationship with a lady whose sons are opposed to the relationship and have contrived to make the life of the applicant unbearable.

The said sons have connection with the police establishment and are using the same to infringe on applicant's rights.

The issues for determination before court were whether or not the actions of the respondent amount to violation of the applicant's fundamental rights as provided for in Chapter 5 of the Constitution and whether the High Court under the provisions of section 84(3) of Constitution is empowered to grant anticipatory bail.

Held – High Court has powers to make such Orders that shall enforce and secure fundamental rights of an individual as provided for in section 70 – 83 of the Constitution.

The right to anticipatory bail or bail pending arrest is not specifically provided for but the same is envisaged by section 84(1) of the Constitution.

The applicant's rights of liberty have been breached and the applicant has reasonable apprehension that it is likely to be violated by the police authorities and remedy of bail pending arrest it is granted.

Cases referred to in ruling

East Africa

Antony Ritho Mwangi and Anor v The Attorney General Nairobi criminal application number 701 of 2001, 760 of 2001 and 631 of 2001 (UR)

Caroline Auma Owino v Republic Nairobi High Court miscellaneous criminal application number 952 of 2001 (UR)

Daniel Mwangi M'Kirimania v The Attorney General High Court miscellaneous criminal application number 998 of 2001 (UR)

James Ratiri K'Owade v The Attorney General Nairobi High Court miscellaneous criminal application number 852 of 2003 (UR)

Peter Mwangi Kahutu v Republic Nairobi High Court criminal revision number 9 of 1999 (UR)

Samuel Murimi Karanja and other v Republic Nairobi High Court criminal application number 412 of 2003 (UR)

Stanley Munga Githunguri v Republic [1986] KLR 1

Tito Musyoka v Republic High Court criminal appeal number 143 of 2004 (UR)

United Kingdom

Williams v Spautz [1992] ALR 583

Ruling

RAWAL AND KIMARU AJ: This is a constitutional reference brought pursuant to the provisions of sections 70, 72, 76 and 84(1) and (6) and 123(8) of the Constitution of Kenya. The reference is further brought under the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual). Practice and Procedure Rules 2001, section 123 of the Criminal Procedure Code, the inherent jurisdiction of the High Court and all the enabling provisions of the law. The reference is supported by two affidavits sworn by the applicant Samuel Muciri W'Njuguna and Naomi Nyawira Njuguna. The applicant has sought various declarations from this Court. The remaining orders sought are as follows:

- (i) A declaration be made that the applicant's fundamental rights and freedoms of the individual under sections 70, 72 and 76 of the Constitution have been contravened by the respondent herein, that is to say that:
 - (a) The applicant's right to liberty, security of person and the protection of the law have been transgressed and or compromised by the respondent and;
 - (b) The applicant has been subjected to unlawful and arbitrary search or entry of his premises/property by the respondent and that his right to privacy has been thereby grossly violated and or has been transgressed by the respondents.
- (ii) A declaration that the remedy/grant and or relief of anticipatory bail and or bail pending arrest and charge is constitutionally provided for and that the

same is lawfully available to persons under the provisions of Chapter 5 of the Constitution of Kenya.

- (iii) A declaration that the applicant has been deprived of the protection of the law by reason of the respondent's failure and or neglect to charge in a court of law the persons implicated in the offences against the person and the property of the applicant.
- (iv) Any further or other order, directions or writs this Honourable Court deems fit, just and appropriate to grant.
- (v) Costs of this suit.

The grounds in support of the reference have been stated on the face of the application. The background to this reference is rather interesting. The applicant depones in the affidavit in support of the reference that he is a Small-scale tea farmer. He is also a spokesman for his fellow small-scale tea farmers at Mataara and Theta tea factories. The applicant also wears another hat. He is a politician. He unsuccessfully vied for the Gatundu North parliamentary seat in 1997 on a National Development Party of Kenya ticket. The applicant states that his championing of the small-scale tea farmers' cause and his exposition of corruption in and mismanagement of the small-scale tea industry has earned him enemies both within the tea industry and in the political front. The applicant gives an instance where he was arrested and held in police custody for a period of three days. This was on the 21 June 2000.

He was subsequently arraigned before the Senior Principal Magistrate's Court in criminal case number 2826 of 2000 but was acquitted under the provisions of section 210 Criminal Procedure Code. The applicant further states that he has severally been threatened to be killed by his said enemies. The problems facing the applicant seems to have taken a turn for the worse when the applicant befriended one Teresia Nyaciuma Mukui (hereinafter referred to as the said lady). The applicant and the said lady are lovers. The said lady's children were not amused by the relationship between the applicant and the respondent remains in the said relationship. Two of the sons have connections with the police establishment. One son John Kimata is a police officer while the other Joseph Gititu Mukui works with the Police Motor Vehicle Inspection Unit at Thika. He is also reputed to be a police reservist and has been issued with a gun. According to the applicant, the children of the said lady have exhibited open hostility towards him and his friend. He narrates an instance of 19 July 2002 when his home was attacked by a gang of about fifty people. He depones that the said gang was led by Joseph Gititu Mukui and John Kimata Mukui who were positively identified by their mother. He states that he was assaulted and tied up with a rope and placed in a vehicle. He was threatened to be killed. His vehicle was damaged and items of

furniture in the house were looted and other house goods were set on fire. He raised alarm when he was under attack. His neighbours came to his rescue. The invaders fled. He was able to free himself and escaped. The applicant states that he later learnt that the enraged local residents burnt down the house of Joseph Gititu Mukui after they had rescued the said lady who had been kidnapped and taken to the house which was later burnt. Three vehicles which were at the house of the said Joseph Gititu Mukui were set on fire. The applicant believed that the attack of the 19 July 2002 was masterminded by the said sons of Teresia Nyaciama Mukui who had earlier threatened him severally prior to the said incident. He further states that he recorded a statement with the police concerning the incident. On the 27 July 2002 the applicant states that the police went to his residence at Karen and ransacked the same with a view of arresting him. The applicant by the time had gone into hiding. The applicant was surprised by the zeal with which the police were aggressively seeking to subject him to harassment over the said arson incident whilst the real perpetrators of the attack were being left scot-free. The applicant's problems did not end there. He was arrested by the police at his home at Karen on the 29 November 2002, taken to Thika Police Station and charged with the offence of arson. The charge was stated to have arisen from the arson incident of the 19 July 2002. The applicant states that prior to the arraignment in court he had responded to the summons by the police when he was so required to appear before them. The applicant is of the view that his prosecution by the police was deliberately undertaken to undermine his credibility as a parliamentary candidate for Gatundu North Constituency. He was of the view that he lost the said elections because of this action by the police which negatively affected his prospects. The applicant further depones that he was acquitted of the charge of arson under the provisions of section 202 of the Criminal Procedure Code after the prosecution had attempted to have the case withdrawn on the 12 February 2003. The applicant further states that even though, the police were aware of the real perpetrators of the crime against him, as evidenced by an exhaustive investigation undertaken by the Investigation Officer one G Rukaria, the Police have been lethargic or become outrightly disinterested in pursuing the said perpetrators. The applicant depones that his efforts to have justice done in respect of the violation of his freedom by the police have always been in vain. He states that he has severally been threatened and his life put in danger and in spite of pursuing legal recourse with the Attorney General, nothing has been done to protect the violation of his right to life and property. Instead he depones that the police has misused and abused its powers to harass him and arraign him severally in court on trumped up charges which ultimately fail to stand up to legal scrutiny. The applicant is of the view that since his said enemies have continually threatened him, he may end up facing a similar fate as of his brother, the late Councillor Maina W'Njuguna who was murdered after

having his life similarly threatened. He alleges that reports to the police of the threat to his life were treated casually leading eventually to his brutal murder. It is with this background that the applicant previously sought to be granted bail pending arrest only to be advised by his counsel that the said remedy was not available in our laws. The applicant has now made this reference, to have this Constitutional Court determine the issues raised.

In his submissions before this court, the appellant has argued that section 84(1) of the Constitution offers any litigant the alternative and direct access to the High Court where there is an allegation that his fundamental rights and freedoms as provided for under sections 77 to 83 (inclusive) of the Constitution have been contravened. The appellant submitted that the High Court has original and unlimited jurisdiction as provided for under section 60 of the Constitution. The applicant submitted that when an applicant makes an application under section 84 of the Constitution, the proceedings should be inquisitorial to the extent that in some instances witnesses can be called for the High Court to satisfy itself of the complaint made. The applicant further argued that an applicant need not prove that his fundamental rights have been violated; a threat of violation or a likely contravention of his fundamental rights and freedoms can be just cause for him to invoke the jurisdiction of the High Court under section 84 of the Constitution. The applicant submitted that the said jurisdiction of the Court under section 84 of the Constitution was wide and unlimited. The applicant was of the view that where a breach of fundamental rights and freedoms is anticipated, the High Court can grant orders to prevent or forestall the occurrence of the said event. The applicant submitted that the Bill of Rights as provided for in the Constitution is an important aspect of a civilized nation and the Courts should not shirk to enforce them. The applicant further submitted that the Constitution gave a special and unique jurisdiction to the High Court to enforce the rights of a person to direct access to the High Court. The applicant further argued that this jurisdiction of the High Court and the right of an individual to have direct access to the High Court was so important that the right of such referral is recognized and specifically provided for under section 84 of the Constitution. The applicant further argued that the Bill of Rights would not be of any use, if the High Court did not enforce them. The applicant submitted that the High Court has been given wide discretion under section 84(1) of the Constitution to enable the High Court give orders in respect of breach of fundamental rights and freedoms as provided by the Bill of Rights irrespective of any consequences. In this regard, the applicant argues that anticipatory bail is envisaged in the Constitution in appropriate cases. The applicant conceded that although the right to anticipatory bail was not specifically stated in the Constitution, the fact that it relates to an important aspect of the enforcement of the fundamental rights and freedoms, the High

Court had jurisdiction to grant it. The applicant was of the view that since his fundamental right to liberty as provided for under section 72 of the Constitution had been severally breached, he has a right to move to the High Court to seek and be granted anticipatory bail when his liberty and freedom was under threat. The applicant then referred to several instances where the law and the Courts have in effect anticipated that bail pending arrest could be granted. The applicant submitted that section 22 of the Police Act (Chapter 84 of the Laws of Kenya) allows a police officer to grant bond or bail to a person to appear subsequently some other time without any charge being filed against him. He argues thus that if so, section 84 of the Constitution definitely visualizes anticipatory bail, in proper cases. The Constitution makes rightly some exceptions as envisaged in sections 85 and 86 of the Constitution. The applicant referred the Court to instances where courts have enforced fundamental rights and freedoms of an individual. In *Stanley Munga Githunguri v Republic* [1986] KLR 1, the High Court issued an order of prohibition even when the applicant had not asked for it when it was satisfied that the fundamental rights of the applicant had been breached under section 84 of the Constitution. In the said case the High Court found that the charging of the applicant was vexatious and an abuse of the due process of the Court. The Court further held that the conduct of the police and that of the prosecution was oppressive. In *Caroline Auma Owino v Republic* Nairobi High Court miscellaneous criminal application number 952 of 2001 (UR) the High Court quoting Archibold on *Criminal Pleading, Evidence and Practice* (37 ed) held that there was no law prohibiting the Court from granting anticipatory bail. This decision was said to have been followed by the High Court in *Daniel Mwangi M'Kirimania v The Attorney General* High Court miscellaneous criminal application number 998 of 2001 (UR) where it was held that there was a matter that prevented the High Court from granting anticipatory bail especially where good cause is shown. In *Samuel Murimi Karanja and other v Republic* Nairobi High Court criminal application number 412 of 2003 (UR) the High Court made orders in form of declarations protecting the fundamental rights of an individual in an application filed under the provisions of section 67(1) and 84(3) of the Constitution. The applicant submitted that courts of other jurisdictions have held that where the arrest and prosecution of an individual was for extraneous purposes, the Court would issue prohibitory orders (See *Williams v Spautz* [1992] ALR 583). The applicant urged this court to consider that the example of the experience in India to be appropriate in this case. The applicant submitted that prior to the change of the law in India, the Courts equivalent to the High Court in Kenya, granted anticipatory bail even though anticipatory bail was not specifically provided for in their laws. The applicant has argued that the Courts in India have been at the forefront of the enforcement of human rights (See *the Code of Criminal Procedure*, 1973 (Sarkars Commentary at page 238). The applicant further

argued that when the Court issued anticipatory bail, the hands of the police in seeking to enforce the law were not tied. Anticipatory bail is always granted with conditions. The applicant relied on the order made by the then Chief Justice who granted him anticipatory bail in this case on the 9 August 2002 with further order that the applicant was to appear before the police. The applicant submitted that the Bills of Rights should be upheld to reflect the reality of Kenya as a democratic society. The applicant urged the Court to look into the spirit of Constitution like courts in other jurisdiction where the protection of the rights of an individual was held to be more important. The applicant submitted that if the fundamental rights of only one individual are not protected by the court, the society will then be much poorer.

In reply, the respondent submitted that under the Constitution the right of bail pending arrest (anticipatory bail) is not enshrined. The respondent argued that the reading of the entire Bill of Rights as provided for in Chapter 5 of the Constitution shows that the right of anticipatory bail was a legal right and not a fundamental right. The respondent argued that anticipatory bail was a legal right and not a fundamental right. The respondent argued that the example of India as given by the applicant in respect of anticipatory bail was inappropriate. The respondent submitted that under the Indian Criminal Procedure Code, section 438 specifically provided for the provisions related to bail pending arrest. The respondent further submitted that the High Court cannot grant anticipatory bail when the same has not been specifically provided for by the statutes. The respondent submitted that in the absence of a specific provision of the law, it did so erroneously. By granting anticipatory bail the High Court usurped the role of Parliament. The respondent argued that the role of the High Court was to interpret the Constitution in line with the existing laws. The respondent further argued that nowhere in the Criminal Procedure Code (Chapter 75 Laws of Kenya) is a legal right to anticipatory bail provided for. What is provided for is bail pending trial or bail pursuant to police investigations or bail pending appeal. The respondent further submitted that the police under the Police Act can give bond to an individual pending his appearance before court because it is provided by statute. But, it is contended, on the other hand the Constitution and the Criminal Procedure Code envisage that a person must first be arrested and brought to court before he can be granted bail. The respondent submitted that in India the provision of anticipatory bail was enacted after an amendment to cure the mischief where political opponents were using their influence to have rivals arrested and charged with non-bailable offences to get to prevent them from challenging them in political contests. Elaborating further this contention, it was submitted that fundamental right is a right which was expressly or impliedly guaranteed by the Constitution. A legal right was defined as a right which is provided for by the statute. We agree to those definitions.

The respondent argued that in so much as anticipatory bail was not provided for by the Criminal Procedure Code then the same cannot be granted. Neither can it be imported in the Constitution as the same was not a fundamental right. Moreover it shall infringe the principle of separation of powers deeply embedded in the Constitution. The respondent argued that the only bail that can be granted by the Courts and which is provided for by section 123 of the Criminal Procedure Code is bail after arrest and not before arrest. The respondent submitted that our High Court and which is provided for by section 123 of the Criminal Procedure Code is bail after arrest and not before arrest. The respondent submitted that our High Court has ruled in various applications made before it that no provision for bail pending arrest existed in our laws. In *Peter Mwangi Kahutu v Republic* Nairobi High Court Criminal Revision number 9 of 1999 (UR) is that the legal right to anticipatory bail did not exist under the Criminal Procedure Code. Likewise in *James Ratiri K'Owade v The Attorney General* Nairobi High Court miscellaneous criminal application number 852 of 2003 (UR). It was held that there existed no law that granted the High Court powers to grant bail pending arrest. In a recent decision by the High Court, it was held that such right of anticipatory bail did not exist in our laws. (See *Tito Musyoka v Republic* High Court criminal appeal number 143 of 2004 (UR)). The respondent further argued that the decisions of the High Court where anticipatory bail was granted are distinguishable.

Churning from the above facts and submissions the issues that this Court is called upon to decide are:

- (1) Whether or not the actions of the respondent amount to violation of the applicant's fundamental rights as provided by Chapter 5 of the Constitution.
- (2) Whether the High Court under the provisions of section 84(3) of the Constitution is empowered to grant anticipatory bail.
- (3) Whether or not the set of facts and circumstances of this case are eligible for the grant of anticipatory bail.

We have considered the arguments that were ably presented to us by Mr *Orengo* the learned counsel for the applicant and Mr *Munda* the learned Principal State Counsel appearing for the State which is the respondent in this case. Before we address the issues raised in this application, we wish to restate the jurisdiction of the High Court as provided by the Constitution. Section 60(1) of the Constitution Provides that:

“There shall be a High Court, which shall be a Superior Court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution.”

Section 84 of the Constitution provides that:

- (1) Subject to sub-section (6), if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or in the case of a person who is detained, if another person alleges a contravention in relation to the detained person) then without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.
- (2) The High Court shall have original jurisdiction:
 - (a) To hear and determine an application made by a person in pursuance of sub-section 1.
 - (b) To determine any question arising in the case of a person which is referred to it in pursuance of sub-section 3.
- (3) And may make such orders, issue such writs and give such directions as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions set in sections 70 to 83 (inclusive).

From the foregoing provisions it is evident that the High Court has powers to make such orders that shall enforce and secure the fundamental rights of an individual as provided for in sections 70 to 83 of the Constitution.

In the instant case, the applicant has stated facts which were not controverted, that the respondent through its police department and its prosecutions arm frustrated him in the enjoyment of his fundamental rights as relates to liberty and property. The applicant has further stated that his fundamental right to life has been breached by the respondents who have refused to take action against people whom the applicant has identified to have threatened his life. The applicant has further stated that he has severally been prosecuted for ulterior motives other than in pursuance to the enforcement of law and order. He states that he has been charged in Court for no other purpose than to frustrate and harass him. He further stated that in none of the cases which he was charged has he ever been found guilty of having broken any law. He has also related instances where the police have allegedly abused their powers and had him arrested and incarcerated in police custody. He gave an example where he was arrested in the year 2002 prior to the General Elections. He deposed that his arrest and subsequent incarceration in police custody irreparably hurt his chances of being elected as a member of parliament for Gatundu North. The applicant has stated that he constantly lives in fear that he would be arrested by the police, even when there was no legal justification. The applicant thus submitted that in the event of the occurrence of such an eventuality, and his fundamental right to liberty having

been threatened, he could not go to Court to protect his fundamental right to liberty because there was no provision in the law allowing the grant of anticipatory bail or bail pending arrest. The applicant was of the view that this situation was the antithesis of the fundamental guarantee to liberty as provided for by the Bill of Rights.

The respondent on his part contends that the right to anticipatory bail or bail pending arrest is a legal right and not a fundamental right. The respondent submitted that as anticipatory or bail pending arrest was not provided for by the statute, the same cannot be read in the Bill of Rights (Chapter 5 of the Constitution) or in section 84(2) of the Constitution.

Before we can address the issue of anticipatory bail it is appropriate for this court to set out the existing law as relates to granting of bail. Section 72(1) of the Constitution provides that no person shall be deprived of his personal liberty has been enumerated. Of relevance to this reference is section 72(5) which provides that:

“If a person arrested or detained as mentioned in sub-section 3(b) (i.e. upon reasonable suspicion of his having committed or being about to commit, a criminal offence) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for the proceedings preliminary to trial.”

This section of the Constitution provides the grant of bail after arrest and not before arrest.

Section 123 of the Criminal Procedure Code provides that:

- “(1) When a person other than a person accused of murder, treason, robbery with violence, attempted robbery with violence or drug related offences is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court and is prepared at anytime while in the custody of that officer or at any stage of the proceedings before that court to give bail that person may be admitted to bail; provided that the officer or Court may instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this part.
- (2) The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.

- (3) The High Court may in any case direct that the person be or not be admitted to bail or that the bail required by a Subordinate Court or police officer be reduced."

This section only provides for situations where a person has been arrested either by the police or has been arraigned in Court after being charged with a criminal offence.

Sections 356 and 357 of the Criminal Procedure Code deal with situations when a person has been convicted and has appealed pending the hearing and determination of the said appeal, the person may be granted bail pending the hearing of the appeal either by the Court which convicted him or by the High Court which he is appealing to.

Mr *Munda*, for the respondent has pointed out situations where the provisions of section 39 of the Criminal Procedure Code has been used by applicants to be granted what in effect amounts to bail pending arrest. What applicants have done is to appear before a magistrate and ask to be arrested and then released on bond, if they have feared that they face likely arrest by the police. The said sections as stated above do not specifically provide for situations where a person being in fear of imminent arrest goes to court and seeks to be granted anticipatory bail.

In all these instances there is no specific provision for which a person in fear of imminent arrest can apply to the Court to grant him anticipatory bail. Perhaps with a view of remedying this anomaly when confronted with applications for bail pending arrest some Courts have applied the practices and procedure of the High Court of Justices in England as provided for by section 3(3) of the Criminal Procedure Code. (See *Caroline Auma Owino v Republic* Nairobi High Court miscellaneous criminal application number 952 of 2001 (UR) and *Daniel Mwangi M'Kirmania v The Attorney General* Nairobi High Court miscellaneous criminal application number 998 of 2001 (UR).

The submission by both parties in this suit that there is no specific provision for granting anticipatory bail is correct. The point of divergence is the interpretation of section 84(1) and (2) of the Constitution. The applicant is of the view that anticipatory bail is envisaged by the said section of the Constitution when the said section is read in conjunction with the Bill of Rights as provided by sections 70 to 83 of the Constitution. The respondent on his part is of the view that since the statute has not provided for the same, the Courts cannot grant anticipatory bail. Neither can the right to the grant of anticipatory bail be read in section 84(1) of the Constitution. The respondent is of the view that parliament is the only place where the said law as relates to anticipatory bail can be granted.

While it is true that the right to anticipatory bail or bail pending arrest is not specifically provided for by statute we are of the humble opinion that the right to anticipatory bail or bail pending arrest is envisaged by section 84(1) of the Constitution. The applicant's ordeal at the hands of the police is an instance where the police has abused its powers to the extreme. When a person is constantly subjected to harassment or is in fear of being unjustifiably arrested, he has a right to recourse to the protection of the Constitution through the High Court where its enforcement is provided for by the Constitution. It would indeed be a tragedy, if the Constitution did not provide a remedy to a citizen whose fundamental rights have been breached. In the instant case, the applicant has had dreadful experiences at the hands of the police where he has been severally incarcerated for no apparent or justifiable reason. For the respondent to say that a person in such a situation should do nothing because there is no law providing for such a person to seek a remedy in Court will completely be the antithesis of the spirit of the Constitution which provides for the protection of fundamental rights and freedoms in the Bill of Rights. We are further of the humble opinion that the right to anticipatory bail has to be called out when there are circumstances of serious breaches by an organ of the state of a citizen's fundamental right. Counsel for the applicant gave the example of India where the legislation in respect of the same did not exist. Later on parliament in India passed the law granting the right to anticipatory bail but only in respect of certain offences. In Kenya, if the High Court were to wait for parliament to legislate the right to anticipatory bail then the High Court would be shirking its responsibility as mandated by section 84(1) of the Constitution to enforce the protection of fundamental rights and freedoms as provided for by the Bill of Rights (Chapter 5 of the Constitution). We would hasten to add that this right to anticipatory bail can only be granted by the High Court in the exercise of its jurisdiction under the provisions of section 84(1) of the Constitution. The right to anticipatory bail will not give a person a right not to appear before the police or any authority who would wish to question a person in connection with the commission of an offence. In the circumstances, therefore, anticipatory bail can only be granted upon terms that are appropriate under the circumstances of each case. In granting anticipatory bail, the High Court would be exercising its supervisory powers to prevent the abuse of the powers granted to the executive to the detriment of the individual. In conclusion, we would like to restate what the Court declared in *Antony Ritho Mwangi and Anor v The Attorney General* Nairobi criminal application number 701 of 2001, 760 of 2001 and 631 of 2001 (UR) at page 1:

"Our Constitution is the citadel where good governance under the rule of law by all the three organs of the State machinery is secured. The very structure of separation of powers and independence of the three organs calls for judicial review

by checking and supervising the functions, obligations and powers of the two organs namely the executive and the legislature. The judiciary though seems to be omnipotent, it is not so, as is obligated to sub serve and uphold the spirit and the majesty of the Constitution and the rule of law.”

It is our humble opinion that it cannot be said that an individual in the Kenya of today cannot be granted anticipatory bail or bail pending arrest when he is in fear that his fundamental rights as to liberty and freedom has been breached. The Constitution of Kenya guarantees that under the provisions of protection of fundamental rights.

The simple reading of provisions of section 84(1) and (2) of the Constitution shall reveal that the High Court while hearing an application wherein contravention or likely contravention of provisions of sections 70 to 83 (fundamental rights), may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of the above said sections.

If the police have contravened or is likely to contravene the rights of liberty of a citizen for ulterior purpose, an anticipatory bail should be an appropriate order to be granted.

In the present case, we agree with the applicant that his right of liberty have been breached and the applicant has reasonable apprehension that it is likely to be violated by the police authorities.

When the statute is silent, this Court cannot become a toothless watchdog of the Constitution which we have sworn to defend. Furthermore, the Constitution itself has granted wide discretion to the High Court presumably to fill in gaps which the statutes have left. This in our humble view is not usurping the powers of parliament or to violate the sacrosanct separation of powers.

Having so decided the declaratory orders that we make are as follows:

- (1) The applicant's fundamental rights and freedoms of the individual under sections 70, 72 and 76 of the Constitution have been contravened by the respondent herein, that is to say,
 - (a) The applicant's right to liberty, security of person and the protection of the law have been transgressed and compromised by the respondent.
 - (b) It is hereby declared that the remedy/grant and or relief of anticipatory bail or bail pending arrest and charge is constitutionally provided for and that the same is lawfully available to persons under

the provisions of section 84(1) of the Constitution of Kenya and Chapter 5 of the Constitution of Kenya.

The costs of this application is granted to the applicant.

Before we conclude our ruling, we would like to state that we are indebted to the counsel who appeared before us for their well researched submissions and references that undoubtedly made the hearing and conclusion of this reference a worthwhile experience.

For the appellant:

Mr Orengo

For the respondent:

Mr Munda

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Digest on Human Rights and Access to Justice in East Africa

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